

Measures of success: Capturing the impact of drug courts.

*' . . . there is a mathematical equation that for every action there is an opposite and equal reaction. I believe this is also true in human affairs. We tell them we care about them and they begin to feel worthwhile. Some pretty important people (judges, lawyers and others in authority) are telling them we don't want them to fail – they begin to believe they can transcend . . . '*¹

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BA, LLB, MA (Crim / Corr) (conferred 17/12/12).

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OF TASMANIA

¹ Judge Herbert Klein, Senior Judge, Circuit Court for Miami-Dade County, credited with creating the drug court concept. Keynote speech, 'The Power of Connection: Fuel for Drug Courts', 1996 Florida Drug Court Conference.

TJ: A new look at an old problem . . .



Warning – heavy umbrella (London, April 2012).

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Declaration of authorship

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the text of the thesis.

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Abstract

This research examines the development of therapeutic jurisprudence (TJ) internationally and focuses on the outcomes of evaluations of various drug court programs. The field of TJ generally and issues in the practice of evaluation are considered critically. The scope of success is examined with respect to recidivism, cost-effectiveness and other measures.

Experiences from my visits to nine international drug courts and numerous associated agencies between February and May 2012 are distilled into a discussion of the 10 Key Components of drug courts at work.

Extracts from interviews with 16 participants of the Court Mandated (drug) Diversion program (CMD) in Tasmania provide insight into outcomes self-attributed to participation in the program. This suggests the benefit of extending the parameters of how success is defined by the program, and could be useful in demonstrating not only the range of achievements of the program but also the value for money it therefore represents within the criminal justice system. A form designed to collect data of this nature is included.

The prison costs saved (avoided) by 14 of the above offenders participating in the CMD program as an alternative to custody total \$1.23 million. It is hoped that the provision of objective evidence of this nature can inform government policy and funding decisions in this area.

In addition, a series of 'observations that work' and 'promising practices' is examined, and suggestions are made for the consideration of the local CMD program.

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List of acronyms and abbreviations

ASI – Addictions Severity Index

CMD – Court Mandated Diversion

LS/CMI – Level of Service / Case Management Inventory

NACDL – National Association of Criminal Defense Lawyers (USA)

NSW – New South Wales

TJ – therapeutic jurisprudence

USA – United States of America

Ibid – as previously cited

Op cit – as per the citation immediately prior

Loc cit – precisely as above.

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Ethics Approval

This research project has been approved by the Human Research Ethics Committee (Tasmania) Network, which is constituted under the National Health and Medical Research Council. The project was conducted under the supervision of Dr Max Travers, Senior Lecturer, School of Sociology and Social Work, at the University of Tasmania.

Introduction

Setting the scene – drug abuse is on the rise around the world . . .

Addressing a conference in Baltimore in March 2012, the Director of the Office of Drug Control Policy for the Obama Administration advised delegates that the cost of healthcare associated with drug use in the USA is now \$193 billion per year. This is in addition to the cost of corrective services which is approaching \$100 billion annually. Drug-impaired drivers are now more prevalent than alcohol-impaired drivers in the USA. The Obama Administration has **abandoned the 'war on drugs'** rhetoric ('we can't arrest our way out of the problem') and is instead emphasising education, public health and treatment for those recovering from drug addiction. From the introduction of the first drug courts in the US over 20 years ago in order to address prison overcrowding and associated expenses, there are now over 2500 drug courts operating around the country, and a five year study has indicated substantial success in terms of breaking addiction, reducing offending and cutting costs.²

A five year American study from the National Center on Addiction and Substance Abuse (CASA) at Columbia University reveals that costs to federal, state and local governments for the impact of addiction in the USA amount to 11% of total government spending, and that 95% of this amount pays for the consequences of addiction with only 2% going to prevention and treatment.³

Although the problems associated with drug abuse are prevalent and profound in the USA, this is symptomatic of a global trend. In the late 1970s and early 1980s it was estimated that the illegal turnover of marijuana / hashish was 'approximately as high as the turnover of the world oil industry. Since then, cocaine, which is much more expensive, has . . . grown to epidemic proportions'.⁴ The Prague Post reported in May that the number of intravenous drug addicts nationwide has risen by more than one-third in the past decade to 40,000. However, government funding for prevention

² Gil Kerlikowske, addressing the International Council of Police Representative Associations, Baltimore, March 2012.

³ National Center on Addiction and Substance Abuse (CASA) at Columbia University, <http://www.casacolumbia.org/templates/Home.aspx?articleid=287&zoneid=32>, accessed July 2012.

⁴ Ron Dunselman (1993), *In place of the self: how drugs work*. UK: Hawthorn Press, p211.

and treatment in the Czech Republic is going in the opposite direction, dropping every year for the past seven years to 75 million Czech crowns in 2012.⁵

The former president of Poland (1995-2005) and now member of the Global Commission on Drug Policy, Aleksander Kwasniewski, wrote in the New York Times in May 2012 that 'drug dependence ought to be treated as a disease rather than a criminal justice problem . . . (but) methadone and other opiate substitution treatments remain illegal in Russia and are overregulated in Ukraine.'⁶

. . . and closer to home

The 2012 United Nations World Drug Report indicates that Australians and New Zealanders are among the biggest recreational drug users in the world, with annual use for all drugs except heroin 'much higher than the global average'. For example, between 9.1% and 14.6% of these populations used cannabis, the most widely used illicit drug across the globe, compared with an estimated worldwide usage of 2.6% to 5%. There was also a statistically significant increase in the use of pharmaceuticals for non-medical purposes in Australia, with annual prevalence for persons aged 14 and over rising from 3.7% in 2007 to 4.2% in 2010.⁷

The 2012 National Drug and Alcohol Research Centre review, conducted by the University of NSW reveals that the number of painkiller prescriptions in Tasmania has increased by 600% in the past ten years, leading to a thriving black market for drugs and an increase in drug-related deaths. 'Tasmanians are being prescribed hypnotics in greater amounts, more frequently than other state in the country . . . (and) the rates of prescribing benzodiazepine medications are the highest in the country',⁸ according to Tasmanian Alcohol and Drugs Service Clinical Director Adrian Reynolds, who commented that such drugs were 'doing more harm than good'.⁹ Jann Smith, chief executive of the Alcohol, Tobacco and Other Drugs Council of Tasmania, noted that 'In Tasmania, prescription medication misuse and abuse has been on the rise for some time',¹⁰ and Dr Raimondo Bruno, University of

⁵ *The Prague Post*, May 2-8, 2012. www.praguepost.com

⁶ Aleksander Kwasniewski, New York Times Op-Ed contributor, 11/5/12.

⁷ *The Hobart Mercury*, 28/6/12 (talking point). www.themercury.com.au

⁸ *The Hobart Mercury*, 7/7/12, p9.

⁹ *The Hobart Mercury*, 25/7/12, p5.

¹⁰ *The Hobart Mercury*, 7/7/12, p8.

Tasmania School of Psychology senior lecturer, suspects that these figures could be underestimating the rates of misuse. He added that non-subsidised prescription rates for schizophrenia medication have also increased substantially in recent years, suggesting that they are likely being prescribed for problems outside of their medical indications.¹¹ Police seizures of prescription drugs have increased about 50% in the past 12 months.¹²

In response to these circumstances, emeritus consultant to the Alcohol and Drug Service at Sydney's St Vincent's Hospital, Dr Alex Wodak, has called for a shift away from law enforcement in this area and a redefinition of Australia's drug policy as primarily a health and social problem. He advocates law reform, expanding and improving drug treatment and increasing funding for health and social measures 'toward the (billions of dollars) now spent annually on drug law enforcement'. University of Adelaide pharmacologist Rod Irvine agreed that 'this emphasis for the past 20 years on law enforcement being the wise way of spending money is not working very well'.¹³

This research contribution

This study comprises a literature review and critical analysis of drug courts (Chapters 1-3); a discussion of some relevant considerations in conducting evaluations (Chapter 4); detailed examination of the effectiveness and cost-effectiveness of drug courts internationally (Chapters 5-6); a cross-jurisdictional analysis resulting from my visits to drug courts and associated services internationally during the first half of 2012 (Chapter 7); a summary of the self-reported impact of participating in the local drug court program by 16 current participants (Chapter 8); and a number of 'observations that work', 'promising practices' and recommendations for the Tasmanian drug treatment court program (Chapter 9).

In critically examining the existing literature and various critiques of current practices, this dissertation concludes strongly in favour of a) the therapeutic court process and b) the need for comprehensive and rigorous evaluation to demonstrate the success such programs achieve. The importance of collecting this data is essential in order

¹¹ *Loc cit.*

¹² *The Hobart Mercury*, 15/8/12, pp1-2.

¹³ *The Hobart Mercury*, 23/7/12, p8.

to make a persuasive case to secure ongoing financial support for drug court programs in lean economic times. This factor is emphasised in the light of recent cuts to such programs in Australia. Some limitations are identified with respect to evaluation practices, and a form is designed in order to capture some of the data which is not collected by the existing tools used for this purpose.

I have now attended sessions in 16 different drug courts locally, nationally and internationally, and have spoken at length with numerous judges, magistrates, prosecutors, lawyers, case managers, treatment professionals, counsellors, evaluators, researchers and other professionals working in the drug treatment court environment. My own experience of drug courts in practice predisposes me favourably towards this application within the criminal justice system. My enthusiasm for the concept in practice has been reinforced by my assessment of the strengths and weaknesses of drug courts about which I have read in recent years in numerous critiques, evaluations and cost-benefit analyses.



The drug court in Santiago, Chile. (February 2012)

Part A: Therapeutic jurisprudence (TJ) in theory and practice

Chapter 1 - Why therapeutic jurisprudence (TJ)?

. . . a system in which punishment has become a religion, imprisonment an industry and humanity merely a factor.¹⁴

Over the past three decades public disillusionment with the operation of the criminal justice system has grown. The system is accused of being expensive, out of date, complex, unfair, slow and lacking regard to victims of crime and to the public generally. Traditional procedures such as imprisonment have not been effective in addressing the needs of specific offender populations. This 'crisis of confidence' has resulted in community unease about the failure of governments to address crime and reduce offending, and political concern, expressed through legislative changes and the establishment of countless inquiries and commissions.

The global development of non-adversarial procedures such as TJ since the early 1990s has also been in response to shifts in the intellectual paradigm concerning the functions of the criminal justice system in delivering therapeutic intervention.¹⁵ This has been accompanied by increasing public expectations of a more responsive and cost-effective system and a growing distaste for adversarial types of procedures.

Increasing frustration among the courts and the public with factory-line processing of offenders, or 'assembly-line justice', produced by traditional approaches to case-processing, plea-bargaining and heavy (and rising) case loads, is reflected in the term 'McJustice', coined by one judge.¹⁶ Mass incarceration has been described as a public policy in the USA, which now imprisons 2.3 million of her citizens. Professor Jonathan Simon, Professor of Law at Berkeley Law, warns of the 'lasting, nefarious

¹⁴ Joe Beeler, P.A. (Miami, Florida), comment on web forum tjsp@topica.com, 4/6/12.

¹⁵ See King, M, Freiberg, A, Batagol, B, and Hyams, R (2009), *ibid*, pp10-11, and Martine Herzog-Evans (2011), Reforming Judicial Practice in France by Emulating American Inventiveness, www.ssrn.com/abstract=2021083, accessed 24/7/12.

¹⁶ Blatz CJ, cited in King, M, Freiberg, A, Batagol, B, and Hyams, R (2009), *Non-Adversarial Justice*. Sydney: The Federation Press, p139.

consequences of social problems', of this policy, including intergenerational recidivism, which he believes are only just beginning.¹⁷

Prisons don't work

Prisons, as an institution, fail in a number of significant ways, as demonstrated by a considerable body of evidence.¹⁸

- They fail to prevent future offending / recidivism.
- They fail to protect and preserve human dignity.
- They fail to use taxpayers' money effectively.
- They fail to address the causes of crime.
- They fail to deal with the consequences of crime.
- They fail to acknowledge the complexities of victimisation and criminalisation, and the offender / victim nexus.
- They fail to facilitate autonomy and self-determination.
- They fail to adequately prepare prisoners to return to the community.
- They cause significant additional harm.

Cavadino and Dignan describe a global institutionalised penal crisis, in which the whole criminal justice system, but particularly prisons, are experiencing both a crisis of penal resources and a crisis of legitimacy, being generally viewed as simultaneously ineffective in controlling crime, inefficient and often inhumane.¹⁹ This is reflected in the widespread international trend in prison numbers being historically very high or even at all-time record levels with dramatic growth in recent years and currently trending sharply upwards. The USA, with a massive 400% increase in the prison population between the mid 1970s and the present day, is the most prominent and dramatic example of 'hyperincarceration'.²⁰

This is despite no consistent relationship having been found between crime rates and imprisonment rates, with crime rates having been in decline since the 1980s and

¹⁷ http://www.huffingtonpost.com/michael-santos/mass-incarceration-as-a-p_b_1447564.html, 24/4/12.

¹⁸ For a discussion of this see White, R & Graham, H (2010), *Working with Offenders: A Guide to Concepts and Practices*. Abingdon (UK): Willan Publishing, p3. See also Mathiesen (2000), Pratt (2007a) & (2007b) and Christie (1993).

¹⁹ Cavadino, M and Dignan, J, (2006) *Penal Systems: A Comparative Approach*. London: Sage Publications, p43.

²⁰ Cavadino & Dignan (2006), *Op cit*, p44.

1990s in the USA and England. Cavadino and Dignan conclude that 'sentencing is the crux of the crisis' – that the most salient feature in imprisonment rates and changes in those rates is the sentencing practice of the courts when dealing with offenders.²¹ This conclusion is notwithstanding the development of a punitive 'culture of control' in late modern neo-liberal societies, reflecting increased feelings of insecurity in the psyche of the late modern individual. This is associated with more populist politics, more competitive and sensationalist mass media representations of crime, the march of globalisation, free market forces and other rapid changes in technology, economics and culture and the fragmentation and destruction of traditional communities and lifelong jobs. This has resulted in what Garland (2011) calls the 'criminology of the other' which rewards punitive, exclusionary political fixes for crime.²²

An appreciation of this situation has led to the development of different approaches to sentencing, including a more therapeutic approach in which the court is more involved in actively addressing the causes of crime than is the case in a traditional courtroom. Such an approach seeks to take a less adversarial and a more constructive 'problem-solving' or solution focused approach to sentencing.

The theories of restorative justice and therapeutic jurisprudence have opened legal thought to the ideas and practices of other social disciplines, and personal and professional disillusionment with the conflict-based theories and practices of law has led to the search for more effective, productive and satisfying means of resolving disputes and solving legal problems.²³ While not yet 'mainstream' judicial practice, the spread of this thinking to court systems around the world in less than 25 years has seen extraordinarily rapid change in what are inherently conservative and traditional judicial contexts. Not only have thousands of therapeutic courts been established, but a therapeutic approach is increasingly being applied in mainstream judicial systems. The realisation is that recidivism, where caused by underlying physical, psychological, social or economic circumstances, is better – and probably

²¹ Cavadino & Dignan (2006), *Op cit*, p46.

²² Cavadino & Dignan (2006), *Op cit*, p47.

²³ King et al (2009), *ibid*, p11.

more economically – dealt with by effective social intervention than by harsher sentences.²⁴

Specialised courts are part of the continuing effort to avoid putting people in prison when something less drastic will work to the advantage of the defendant and the public, satisfying concerns of humane treatment and reducing the costs of punishment.²⁵

The link between criminal behaviour and the problems that feature prominently in the lives of people with multiple and complex needs – such as mental illness, substance abuse, homelessness and unemployment – is well established and thoroughly documented. When offending occurs because of these underlying causes, the traditional sentencing approach is unlikely to prevent re-offending. Imprisonment introduces the prisoner to a wider circle of offenders but does little to address the underlying reasons for criminal behaviour. Fines have a limited effect if the offender has little or no means to pay them. Suspended sentences only set the offender up for a term of imprisonment if they are not supported by conditions that address the source of the problem. A more appropriate approach that addresses the underlying causes of offending is needed.²⁶ Specialty courts, also called problem-solving or problem-oriented courts, have become intimately connected with the delivery of rehabilitative outcomes through diversion from prison into intensive therapeutic interventions.²⁷

A new approach is possible, driven not only by moral or social concerns that we have about actual and perceived crime rates and a high prison population, but informed by economic analysis and argument.²⁸ The use of drug courts and other post-sentence alternatives to imprisonment for drug misusing offenders is now

²⁴ Berman, cited in King et al (2009), *ibid*, p139. See also Freiberg (2001), cited in Success Works (2008), *Tasmania's Court Mandated Drug Diversion Program Evaluation Report*, available at www.justice.tas.gov.au, p20.

²⁵ Bamberger, P S (2003), 'Specialized Courts: Not a Cure-All', 30 *Fordham Urban Law Journal*, Fordham University School of Law. HeinOnline, accessed 27/6/11, p1092.

²⁶ Thomas Goodall Associates, cited in Victorian Department of Justice 'Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches', March 2006.

²⁷ Jefferies (2003), cited in Payne, J (2006), 'Specialty courts: current issues and future prospects', *Trends & Issues in Crime and Criminal Justice* No 317. Canberra, Australian Institute of Criminology, p1.

²⁸ Fox, C and Albertson, K (2010), 'Could economics solve the prison crisis?', *Journal of Community and Criminal Justice*, Vol 57, No 3, p264.

proactively endorsed by the United Nations (UNODC, 2007), the Member States of the European Union (EMCDDA, 2005) and the Australian Government.²⁹



The Santa Barbara Drug Treatment Court in session. (March 2012)

²⁹ Register of Australian Drug and Alcohol Research, <http://www.radar.org.au>, accessed 4/1/12. See also United Nations Office on Drugs and Crime, UNODC and Drug Treatment Courts at <http://www.unodc.org/unodc/en/legal-tools/Drug-Treatment-Courts.html>

Chapter 2 - What is therapeutic jurisprudence?

Background, definitions and an overview of the therapeutic jurisprudence concept

Theoretical bases

Theories of non-adversarial justice emanate from multiple and complementary disciplines. They include appropriate or alternative dispute resolution (and its component processes such as mediation, evaluation, negotiation, conciliation and arbitration), participatory justice, therapeutic jurisprudence, preventive or proactive law, restorative justice, family law, comprehensive law, creative problem solving, holistic law, visionary law, diversion, problem-solving courts, Indigenous courts, managerial justice and multi-door courthouse theory.³⁰

Bruce Winick describes the problem-solving courts' revolution as 'largely atheoretical. It grew out of experimental approaches used in drug treatment courts to facilitate the substance abuse treatment process, which, because of their success, were transplanted into other judicial arenas'.³¹ He acknowledges that TJ can be seen as a theoretical grounding for this developing judicial movement, and defines a 'symbiotic relationship' between TJ and problem-solving courts, which can do much to transform law into an instrument of healing for both the individual and the community.³²

David Wexler is clear that 'TJ is not and has never pretended to be a full blown 'theory'. More properly, and more modestly, it is simply a 'field of inquiry' – in essence a research agenda – focusing attention on the often overlooked area of the impact of the law on psychological wellbeing and the like. From the very beginning,

³⁰ Daicoff, S (2006), cited in King, M et al (2009), *ibid*, p6.

³¹ Winick, B (2003), 'Therapeutic Jurisprudence and Problem Solving Courts', 30 *Fordham Urban Law Journal*, Fordham University School of Law, p1062.

³² Winick, B, (2003), *op cit*, p1090.

however, TJ has sought to work with frameworks or heuristics to organise and guide thought.’³³

Wexler recently wrote in the *Phoenix Law Review* that TJ, ‘the academic heart of the comprehensive law movement’, is now a reasonably mature interdisciplinary field of inquiry that uses several simple conceptual frameworks to look at the law in a richer way. Those frameworks have allowed TJ to become influential in practice as well as theory, have facilitated thinking and promoted further development in important ways – allowing for change and reform that is much more than merely the standard kind of pragmatic incrementalism.³⁴

A TJ approach to criminal justice recognises that the processes used by courts, judicial officers, lawyers and other justice system personnel can impede, promote or be neutral in relation to outcomes connected with participant wellbeing such as respect for the justice system and the law, offender rehabilitation and addressing issues underlying legal disputes. Developed by Professors David Wexler and the late Bruce Winick in the USA in the 1980s in the context of mental health law, it is now seen to apply to all areas of the law and across cultures and is the subject of international study and development.³⁵ Freiberg argues that recent shifts in practices in drug courts, family violence courts, mental health courts and Koori courts can be generalised to the wider judicial and correctional system through an understanding of the theory of TJ. The key features of problem-solving courts can provide a ‘constructive alternative to the flawed adversarial paradigm which presently dominates the criminal justice system’.³⁶

A table of ‘Principles of an Effective Court-Based Mental Health Diversion Program’ prepared by the Australian Institute of Criminology in 2011³⁷ identified the following

³³ Wexler, D (2011), ‘From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part’, *Arizona Legal Studies Discussion Paper No 10-12*, University of Arizona, <http://ssrn.com/abstract=1580129>, p33.

³⁴ *Phoenix Law Review*, Vol 5, No 4, Summer 2012, pp671-2. <http://www.law.arizona.edu/depts/uprintj/pdf/plr54.pdf>

³⁵ The Australasian Institute of Judicial Administration (AIJA), ‘The Concept of Therapeutic Jurisprudence’, www.aija.org/au/research/australasian-therapeutic-jurisprudence-clearinghouse/. . . accessed 23/6/11, July 2012.

³⁶ Freiberg, A (2008), ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’, The Federation Press Digital Editions, <http://digital.federationpress.com.au/t42c2/1>, accessed 25/6/11, p6.

³⁷ Australian Institute of Criminology website, www.aic.gov.au, accessed 25/6/11.

characteristics, which could equally be applied to other forms of problem-solving courts.

Therapeutic legal processes	Strong leadership	Clear terms of participation
Regular meetings of key agency representatives	Clearly defined realistic target populations	Participant informed consent
Client confidentiality	Dedicated court team	Early identification
Judicial monitoring	Sustainability	Integrated services

Wexler and Winick define TJ as the study of the role of the law as a therapeutic agent, focussed on the law’s impact on emotional life and psychological well-being.³⁸ TJ humanises the law and regards the law itself as a social force that produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other factors, but that the law’s role in reasoning and rehabilitation and as a potential therapeutic agent should be recognised and factored into the legal process, legal practice and the process of sentencing.³⁹ It harnesses the power of the courtroom to a greater extent than is traditionally the case in order to engage in diversion of offenders into appropriate treatment to address the causes of offending behaviour, with wellbeing, stability and reduced offending the primary goals. In practice, TJ is a collaborative approach, and also examines promising literature from psychology, psychiatry, clinical behavioural sciences, criminology and social work to see whether those insights can be incorporated into the legal system. An example of this is the application of a medical model of ‘facilitating treatment adherence’ to the legal system.⁴⁰

³⁸ David Wexler (2010), ‘Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development’, *Irish Probation Journal*, Vol 7, p94. See also Ken McMaster, ‘Therapeutic jurisprudence has been defined as the study of the effects of law and the legal system on the behaviour, emotions, and mental health of people’, HMA Newsletter, September 2011. HMA@wired.co.nz

³⁹ Wexler, D (1999), ‘Therapeutic Jurisprudence: An Overview’, International Network on Therapeutic Jurisprudence website, <http://www.law.arizona.edu/depts/upr-intj/intj-menu.html>, accessed 23/6/11.

⁴⁰ Wexler (2010), *ibid*, p7.

TJ and offender rehabilitation, responsivity and 'good lives'

Reduced re-offending requires the appropriate assessment, treatment and management of offenders, based on principles of rehabilitation. The most popular approach to rehabilitation at present is the risk-need model based on 'what works' research.⁴¹ The match between offenders and programs requires consideration of differences in risk, need and responsivity (RNR). Birgden believes that the responsivity principle has been neglected in the literature, particularly with respect to the impact of the law on external responsivity.⁴² She argues that rehabilitation within the correctional system has focussed on risk management that leads to the protection of the community but that it has not adequately addressed the need of offenders for fulfilment in life, and that corrective services should address both matters.⁴³

Birgden identifies five principles which can underpin TJ in relation to offender rehabilitation:

1. The way the law is implemented can increase, decrease or have a neutral effect on well-being;
2. The law should capitalise on the moment that offenders are brought before it to trigger a pro-social lifestyle;
3. The law should be a multidisciplinary endeavour with psychology and law cooperating to enhance wellbeing;
4. The law balances community protection (justice principles) against individual needs (therapeutic principles); and
5. TJ is normative with implicit value judgements and maximises the overarching aims of the law.⁴⁴

⁴¹ Andrews (1995), Andrews & Bonta (1998), McGuire & Priestley (1995), Losel (1995). Cited in Birgden, A (2006) 'Applying TJ Principles in Sentencing: Courts, Corrections and Beyond'. *Conference proceedings from Sentencing: Principles, Perspectives & Possibilities*, February 2006. www.njca.anu.edu.au/Professional%20Development/...Birgden.pdf, p3, accessed 25/6/11.

⁴² Birgden, A (2004), 'Therapeutic Jurisprudence and Responsivity: Finding the Will and the Way in Offender Rehabilitation'. *Psychology, Crime & Law*, 10(3), p283.

⁴³ King, M (2003), 'Applying TJ in Regional Areas – The Western Australian Experience', <http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>, accessed 25/6/11, p7.

⁴⁴ Birgden, A (2006), 'Applying TJ Principles in Sentencing: Courts, Corrections and Beyond'. *Conference proceedings from Sentencing: Principles, Perspectives and Possibilities*, February 2006, pp 3 & 19.

Ward and Stewart also maintain that the construct driving rehabilitation in corrections should be good lives or wellbeing, rather than risk management or relapse prevention.⁴⁵ They believe that without an explicit conception of good lives, offenders are unlikely to make the necessary shift from antisocial to pro-social lifestyles. Thus, the aims of rehabilitation are to identify the internal and external obstacles that thwart offenders from leading good lives, and to equip them with the necessary skills, knowledge and resources to achieve psychological wellbeing. Individual autonomy is emphasised by taking a more constructive, positive and holistic approach to wellbeing, such as that proposed by TJ.

Therapeutic jurisprudence as a legal theory provides the opportunity to complement the psychological theory of 'good lives' and to address responsivity in offender rehabilitation. TJ is beginning to underpin current government policy initiatives in the Victorian criminal justice system, and Birgden has developed a rehabilitation framework which has been operationalised in the Victorian correctional system.⁴⁶ Irish Child Welfare Consultant Kieran McGrath believes that TJ and therapeutic approaches like the Good Lives Model (GLM) are completely complementary, as they seek the optimum outcome for all concerned.

GLM has a very strong 'how' in its application, because it focuses on prevention of recidivism, is strong on victim awareness but is, at the same time, very respectful in its approach to offenders. In that sense it owes a huge debt to Motivational Interviewing which is, of course, totally consistent with TJ principles.⁴⁷

Birgden responds that the relationship between TJ and GLM is that therapeutic jurisprudence is a legal framework (that applies social science knowledge) and the GLM is a psychological framework that can provide a social science strategy for TJ. The GLM is a theory that addresses physical, social and psychological wellbeing and determines the underlying human needs that an offender attempts to meet through offending. The GLM emphasises offender engagement and determining 'what helps'

⁴⁵ Ward & Stewart, cited in Birgden (2002), 'Therapeutic Jurisprudence and "Good Lives": A Rehabilitation Framework for Corrections. *Australian Psychologist*, 37 (3), p181.

⁴⁶ Birgden, A (2006), *ibid*.

⁴⁷ Kieran McGrath, Child Welfare Consultant, Kilmainham, Dublin. Comments on international TJ web forum tjsp@topica.com, 9/12/11.

(ask the client) rather than 'what works' (an empirical question). It supports motivational approaches and, like TJ, is humanistic and supports well-being.⁴⁸ Michael King adds that 'the GLM is a good fit for TJ and judging and the criminal justice system generally. The Geraldton Alternative Sentencing Regime had a definition of rehabilitation as more than the absence of offending, being the ability to lead a happy and constructive life in the community, which is a nice fit for GLM. We took a TJ approach in our work.'⁴⁹

Relative to traditional court processes, the therapeutic court process emphasises alternative dispute resolution and avoidance through problem solving, a therapeutic rather than a legal outcome and a collaborative rather than an adversarial process. It is a more people oriented and interest or needs based response, rather than being case and rights based. It is more forward looking, planning rather than precedent-based and relies more on common sense, rather than a legalistic approach. The role of the judge is more that of a 'coach' rather than an arbiter or umpire, and there is a wider range of participants and stakeholders. The process is more interdependent than individualistic, less formal and ultimately values effective outcomes over an efficient process.⁵⁰ However, safeguards protect due process and the principles of natural and open justice, so that the interventions of new transformative court processes are not a divergence from foundational principles of law and the criminal justice system.⁵¹

Therapeutic jurisprudence is not concerned with abstract interpretations of statute or case law but with the effect of the law in action. Like legal realism, it sees the law as a social force.⁵² Wexler identifies four overlapping areas of inquiry in therapeutic jurisprudence: (1) the role of the law in producing psychological dysfunction, (2) therapeutic aspects of legal rules, (3) therapeutic aspects of legal procedures, and (4) therapeutic aspects of judicial and legal roles.⁵³ Burns and Peyrot maintain drug

⁴⁸ Dr Astrid Birgden PhD, Consultant Forensic Psychologist (Australia), Fellow, Deakin University. Comments to international TJ web forum tjsp@topica.com, 10/12/11.

⁴⁹ Dr Michael King, comments to TJ web forum tjsp@topica.com, 10/12/11.

⁵⁰ Warren (1998), cited in Rottman, D & Casey, P (1999), 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts', *National Institute of Justice Journal* 12(14), p240.

⁵¹ White & Graham (2010), *Working with Offenders*. Abingdon: Willan Publishing, p31.

⁵² King et al (2009), *ibid*, p26.

⁵³ Wexler (1991), cited in King et al, (2009), *ibid*, pp28-9.

courts suggest a shift away from a 'get tough' retributive approach to criminal justice and toward a 'tough love', rehabilitation and treatment-oriented approach.⁵⁴

Court diversion programs

'Diversion' in this respect refers not to diversion from the system, but to alternative programs within it. Such intervention in drug courts is designed to provide for a reduction in or cessation of drug use and drug or drug-related offending.⁵⁵

Contemporary court diversion programs involve a magistrate adjourning a criminal case, often for months but possibly up to two years, while the defendant participates in a range of programs to address issues such as drug and alcohol use. Some programs allow for diversion prior to or subsequent to determination of guilt, while others are only post-conviction, pre-sentence programs. Some diversion style programs have emerged to assist offenders with special needs, such as the intellectually disabled list at the Central Law Courts in Perth, and other programs targeting street workers and the homeless. Pure diversionary courts employ only the processes of the adjournment of the case and the offer of a reduction in sentence for successful compliance. Any further engagement between the judicial officer and the defendant or the use of therapeutic techniques such as goal-setting, problem-solving and encouragement depends on the individual judicial officer.⁵⁶

Problem-solving courts

The problem-solving court is the most common model that has been developed to address increasing rates of recidivism, burgeoning prison populations and the inability of traditional courts to respond to offenders with specific needs. They incorporate therapeutic and rehabilitative models that concentrate on the underlying causes of offending, thus reducing the risk of continued involvement in the justice system. This affords substantial benefits to the offender, their family and the broader community.⁵⁷

⁵⁴ Burns, S and Peyrot, M (2003), 'Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts', *Social Problems*, Vol 50, No 3, p416.

⁵⁵ White & Graham (2010), *ibid*, p196.

⁵⁶ The AJJA website, 'Court diversion programs', www.ajja.org/au, accessed 23/6/11.

⁴⁶ Victorian Dept of Justice (2006), 'Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches', p3, accessed 29/6/11.

www.lisainc.com.au/.../Policy%20Framework%20%20Solving%20Courts%20and%20Approaches%20

Winick describes problem-solving courts as future focussed, employing persuasion and 'benevolent coercion' in a public health approach to the 'recycling problems' that face courts (such as substance abuse, domestic violence, child abuse and neglect, mental illness and criminality). He believes problem-solving courts are a 'noble undertaking' which place judges as members of the treatment team and encourage them to develop their 'bench-side manner', just as physicians need to develop their 'bed-side manner'.⁵⁸

Problem-solving courts originated in the USA with the establishment of drug courts and domestic violence courts. Since then, a large range of problem-solving courts has been established. These include community courts as well as courts dealing with substance abuse, family violence, child abuse and neglect, driving offences, mental health issues and tribal courts. In early 2010 there were at least 3,000 specialised problem-solving courts across the US.⁵⁹ By February 2011 this had increased to almost 4,000, including more than 2,560 drug courts.⁶⁰ Some courts employ a hybrid approach, addressing more than one offending related problem.⁶¹ For example, the Court Integrated Services Program (CISP) in Victoria focuses on multiple complex needs of offenders, linking them to services related to mental health, alcohol and drugs, accommodation, brain injury, disability, indigenous status or other issues that may be of concern. This program has had the benefit of \$170 million worth of dedicated funding. More commonly, problem-solving courts will focus on one particular area of need, such as mental health or drug use.

⁵⁸ Winick, B (2003), 'Therapeutic Jurisprudence and Problem Solving Courts', *ibid.* HeinOnline, accessed 27/6/11, pp 1056-7, 1060, 1061, 1068, 1069, 1073, 1078 & 1090.

⁵⁹ Porter, R, Rempel, M & Mansky, A (2010), 'What Makes a Court Problem-Solving? Universal Performance Indicators for Problem-Solving Justice'. New York: Center for Court Innovation, piii. www.courtinnovation.org/topic/drug-court, pdf accessed 29/6/11.

⁶⁰ Center for Court Innovation, www.courtinnovation.org/topic/drug-court, accessed 1/7/11. See also Kerlikowske, *ibid.*, and Hora, P (2011), 'Courting New Solutions Using Problem Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits', *Chapman Journal of Criminal Justice*, Vol 2, No 1, pp11 & 50. Available at ssrn.com/abstract=1801315 See also Hora (2011), *ibid.*, pp11 & 50.

⁶¹ The Australasian Institute of Judicial Administration, 'Problem-Solving Courts', *ibid.*, accessed 23/6/11. <http://www.courts.vic.gov.au/courts-tribunals/specialist-courts-and-initiatives/courts-integrated-services-program-cisp>, accessed 3/7/11.

Freiberg identifies the following key features of problem solving courts:⁶²

Problem-solving courts	Focus on health and wellbeing	Tailored responses
Ongoing judicial supervision	Direct offender engagement	Non-adversarial approach
Integrated service provision	Focus on results	Community outreach

Considerations in assessing the success of problem-solving courts to date have focussed on the following. Do they: (1) reduce recidivism, (2) increase participant retention rates, (3) increase participant satisfaction, (4) increase community confidence, and (5) cost less than a mainstream court in monetary and health / social terms, taking into account the additional court time that these programs utilise on participants?⁶³

Drug courts

The origin of drug treatment courts can be traced to Dade County, Miami, Florida, in 1989,⁶⁴ and at least 2,560 drug courts now exist across all 50 US states. For example, as of October 2011, there were 24 operational drug courts in the state of Nebraska: 12 adult drug courts, five juvenile drug courts, five family dependency drug courts, one DUI (Drive Under the Influence) court and one Young Adult Drug Court.⁶⁵

Drug courts initially emerged in Australia in New South Wales in 1999 as a response to the perceived failure of traditional court systems to effectively deal with drug-related offending, and have since been implemented in all states and territories.⁶⁶

⁶² Freiberg (2001), *op cit*, pp 20-21.

⁶³ Freiberg (2005), cited in Victorian Dept of Justice Policy Framework, *ibid*, p7.

⁶⁴ Hora (2011), *loc cit*, and Winick, B (2003), *ibid*, p1056.

⁶⁵ Administrative Office of the Courts/Problem-Solving Courts, Quarterly Status Update for Nebraska Problem-Solving Courts. Chief Justice Quarterly Report October 2011.Nebraska.pdf.

⁶⁶ White, Rob & Perrone, Santina (2010), *Crime, Criminality and Criminal Justice*. Melbourne: Oxford, p378.

Drug courts help participants address their underlying illicit drug (and, in some cases, alcohol) problems, with the assistance of ongoing judicial case management, a court team and community agencies. Typically, community or residential rehabilitation is available to participants, and a system of sanctions (such as breach points) along with incentives promotes participant compliance. Graduation ceremonies, applause in court to recognise participant achievement and the use of behavioural contracts are common features of drug courts.⁶⁷ Positive interaction with participants during court and encouragement from the bench are also incorporated practices.⁶⁸

Evidence indicates that they have achieved encouraging results in retaining offenders in treatment, reducing drug use and recidivism and saving prison costs.⁶⁹ Drug courts are 'establishing themselves in the criminal justice landscape on the basis that they seem to work'.⁷⁰ As drug courts have been pioneered and are most comprehensively developed in the USA, it is one area of criminal justice policy in which it is both informative and promising to look to American data with respect to performance evaluation. Research is demonstrating improvements in drug court results over time and with more rigorous evaluation. White and Graham cite 2003 figures suggesting a 32% reduction in recidivism among drug court participants in New York, which was, at that time, considered 'quite significant in the light of the fact that recidivism rates are usually quite high'. Research conducted over 2005 and 2006 demonstrates that 78% of American drug courts are effective in reducing crime rates.⁷¹ The most recent research available concludes that the vast majority of American drug courts outperform every other strategy for drug addicted offenders. Closer examination reveals that Drug Courts are the USA's most effective strategy for reducing substance abuse, crime, and recidivism while constituting considerable

⁶⁷ The AIJA website, 'Drug courts', *ibid*, accessed 23/6/11.

⁶⁸ King, M (2003), *ibid*, p4.

⁶⁹ Belenko (1998), Berman and Feinblatt (20010), Freeman (2002), New York State Commission on Drugs and the Courts (2000), Russell (1993), cited in Victorian Department of Justice 'Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches', March 2006, *ibid*, accessed 29/6/11, p8.

⁷⁰ White & Graham (2010), *ibid*, p30.

⁷¹ Wilson et al (2006), Lowenkamp et al (2005) & Shaffer (2006). Research conducted by NPC Research and available at www.npcresearch.com, accessed 20/10/11.

savings for tax-payers.⁷² Chapters 5 and 6 will examine numerous examples of drug court evaluations in more detail.

New developments in drug court practice

The recently published '*Solution-Focused Judging Bench Book*'⁷³ describes the shift occurring in Australia and New Zealand from 'problem-solving courts' to 'courts of solutions' where the parties solve their own problems.⁷⁴ The book illustrates Australia's lead in this area compared to America where problem solving courts are described as a (more) autocratic process where a judge controls a defendant's compliance with a plan developed by experts. This reflects current discussion in the TJ community worldwide as to what the core mission of the court system should be; whether we are witnessing a paradigm shift in the evolution of the judicial role; and whether drug courts should be 'nice add-ons' or fundamental components of the judicial process, with all the philosophical, jurisprudential and funding implications raised by these questions. The current American framework maintains that participation in a drug court is a privilege and not a legal right, and, in that context, drug courts in the US are constantly struggling to maintain the funding that is needed for them to survive, even though the cost benefits and avoided costs have been widely documented.⁷⁵

Wexler and King caution that under a 'problem-solving' philosophy, many drug courts have become somewhat coercive and paternalistic, departing from the principles of TJ. They urge a 'solution-focused' approach to judging, more in line with TJ notions, and based on procedural fairness, active client involvement and participation, close

⁷² NADCP Brief in Response to DPA and JPI Attacks on Drug Courts, www.nadcp.org/learn/setting-record-straight-criticisms-answered, accessed 20/10/11. The NADCP is a not-for-profit organisation founded in 1994 that advocates for the creation, study and funding of drug courts. It has membership of more than 2,100 US courts.

⁷³ King, M (2012), *Solution-Focused Judging Bench Book*, published by the Australasian Institute of Judicial Administration, www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf

⁷⁴ For a brief overview of Australian drug courts, see Moore, Liz (2012), 'Tackling Drug Crime the TJ Way: Report on Therapeutic Jurisprudence and the Tasmanian Court Mandated Diversion Program', *ibid*.

⁷⁵ Comments made by Caroline Cooper, Research Professor and Associate Director, Justice Programs Office, School of Public Affairs, American University, Washington DC, on international TJ web forum tjsp@topica.com, 22/2/12.

attention to client strengths, and other concepts that place the client at the centre stage of the therapeutic effort.⁷⁶

David Wexler has recently written that much TJ practice has been 'hit or miss' and a more systematic way of collecting creative contributions to the discipline is needed, along with the development of a new type of 'practical interdisciplinary scholarship' to disseminate and evaluate these developments. He suggests that this could be accomplished, in part, through continuing education programs, legal clinics and journaling assignments and law student interviews of lawyers and judges.⁷⁷

Current challenges for drug courts identified in a recent panel discussion entitled 'Returning to the Key Components' include ensuring a therapeutic and integrated focus; evidence-based treatment; training and education on the disease of addiction; reaching the population of offenders who need the program; prompt program entry; protecting Constitutional rights; and evaluation.⁷⁸

Marlowe (2012) discusses the challenges for drug courts into the future, and concludes that defining best practices in optimising outcomes and making the most of efficient resources will be critical as drug courts 'go to scale' and attempt to address the full scope of the nation's drug problems. 'To treat every American in need, drug courts will be required to optimise their services, take advantage of economies of scale and instil greater efficiencies in their operations'.⁷⁹

⁷⁶ Wexler, D and King, M (2011), 'Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence'. *Court-Supervised Treatment Alternatives to Incarceration for Drug-Dependent Offenders: The Drug Policy Agenda*, Cooper & Lombardi (eds) (2011), Arizona Legal Studies Discussion Paper No 10-46. <http://ssrn.com/abstract=1722278>

⁷⁷ Wexler, D (2011), *ibid*, p40.

⁷⁸ Handout of panel discussion, NADCP, American University and Bureau of Justice Administration, 6/1/12.

⁷⁹ Marlowe (2012), 'Best Practices in Drug Courts', *Drug Court Review*, Vol 8, No 1, p1. www.ndci.org/sites/default/files/nadcp/DCR_best-practices-in-drug-courts.pdf, accessed 4/8/12, p5.



*The LA Drug Court team 'staffing' meeting, prior to the court session.
(March 2012)*

Chapter 3 - Criticisms of TJ and problem-solving courts

The literature identifies a range of criticisms of therapeutic jurisprudence from the lack of clarity of its basic conceptual framework and operational definition to questions about the very basis and value of TJ. It is accused of being 'old wine in a new bottle'; of implying a 'touchy feely approach' to criminal justice; of being offender-oriented and court-centred.⁸⁰ Freiberg⁸¹ has identified a number of limitations of TJ problem-oriented courts, including the following:

- They are resource and time intensive; (and higher costs may be challenged during an economic downturn⁸²)
- They adopt a narrow focus on the causes of crime;
- They place a great deal of power in the hands of the judiciary and personalise legal matters (Hoffman warns against the dangers of paternalism inherent in the concept⁸³);
- They may compromise the adversarial nature of the law by undermining the roles of prosecution and defence (by rendering them too ambiguous and blurring the boundaries of clear responsibilities and role delineation); and
- Without checks and balances, the sanctions and requirements of these courts may be more onerous and take more time than sanctions imposed by traditional courts.

Indeed, Wundersitz (2007) found that drug court programs can be perceived to be significantly more intrusive and potentially more punitive than normal processing options.⁸⁴ The regulation of participants' living conditions and the frequent drug testing they undergo involves some loss of privacy, disclosure of otherwise confidential medical information and a measure of coercion – plus the risk, (if they do

⁸⁰ For a full discussion of these, see King et al (2009), *ibid*, pp31-8.

⁸¹ Freiberg, A (2002), 'Specialised Courts and Sentencing', Conference Paper presented at the Probation and Community Corrections: Making the Community Safer Conference (23-24 September 2002), convened by the Australian Institute of Criminology: Perth. njca.anu.edu.au/Professional%20Development/...Birgden.pdf

⁸² Rottman, cited in Victorian Department of Justice Policy Framework (2006), *ibid*, p7.

⁸³ Hoffman, cited in Victorian Department of Justice Policy Framework (2006), *ibid*, p8.

⁸⁴ Success Works (2008), *ibid*, p24.

not complete treatment), of an incarceration sentence longer than that which typically results from a plea bargain or an adjudicative disposition.⁸⁵

In addition, proactive judging, which requires the presiding officer to act as judge, mentor, supervisor and service broker, threatens some of the core judicial values such as impartiality, fairness, certainty and the separation of powers between the judiciary and the executive.⁸⁶ King notes that for judicial officers themselves to introduce such courts may be seen to be initiating policy which is in the province of the executive rather than the judiciary.⁸⁷ Popovic argues that specialised courts may lead to fragmentation of the criminal justice system and are susceptible to capture by special interest groups.⁸⁸

A major ethical issue with respect to drug court teams is whether offenders are disadvantaged by decisions made in case conferences involving judges, clinicians, prosecution and defence counsel to which they are not direct parties. The National Association of Criminal Defense Lawyers (NACDL) in the USA objects to this practice.⁸⁹ Retired US judge and internationally pre-eminent drug court authority Peggy Hora advises that American courts are taught to take a specific waiver in the form of the participant's written consent on this issue, as they are in relation to federal regulations regarding confidentiality of substance abuse treatment. The 2011 Drug Court Judicial Benchbook produced by the National Drug Court Institute has a lengthy chapter discussing the ethical obligations of judges in drug courts, including in relation to ex parte contacts.⁹⁰ The Drug Court Clearinghouse at the Bureau of Justice Assistance, American University (Washington DC) has also compiled a list of nine US states' responses as to how they address this matter in practice.⁹¹ The Benchbook points out that the provisions of the Health Insurance Portability and Accountability Act (HIPPA) (1996) in relation to the privacy of health information do not apply to drug courts, law enforcement, correctional facilities or probation officers,

⁸⁵ Burns, S & Peyrot, M (2003), *ibid*, p434.

⁸⁶ King et al (2009), *ibid*, p167.

⁸⁷ King (2003), *ibid*, p4.

⁸⁸ Victorian Magistrate Jelena Popovic, Victorian Department of Justice Policy Framework (2006), *ibid*, p8.

⁸⁹ National Association of Criminal Defense Lawyers (2009), 'America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform', p54. <http://www.nacdl.org/criminal-defense/problem-solving-courts/>, accessed August 2012.

⁹⁰ Judge Peggy Hora (Ret), communication to international TJ web forum tjsp@topica.com, 11/7/12. See also www.ndci.org/sites/default/nadcp/14146_NDCI_Benchbook_v6.pdf, pp195-213, particularly p203.

⁹¹ <http://www1.spa.american.edu/justice/documents/2430.pdf>, p183, accessed 4/8/12.

but that the spirit of the legislation should be respected by requiring court orders and consent forms for the disclosure of treatment information to drug court teams.⁹²

Problem-solving courts pose significant challenges for prosecution and defence counsel, and the team approach, requiring cooperation and collaboration, can sit uneasily with the traditional notions of the adversarial system. McGrath comments that multi-disciplinary teams can have 'major cultural issues'.⁹³

The NACDL in the USA has produced an extensive report into America's problem-solving courts, making dozens of recommendations about decriminalising substance abuse; the operation of drug courts (including about pleas of guilty and admission criteria and practices); ethical considerations about the role of defence counsel; concerns about minorities, the poor and immigrants; the misallocation of public resources (to low risk rather than high risk participants) and about the need for further methodologically sound research. These are included in Appendix 1.⁹⁴

Evidence suggests that the style of some judges and magistrates will be more suited to operating in a problem-solving jurisdiction than others, and some may not be willing to engage with defendants in the manner required in this model. This may lead to questioning whether defendants have equal access to justice, but as defendants are generally not able to choose who presides over their court appearance in any case, it is difficult to argue that creating problem-solving courts diminishes the existing conditions for defendants in this sense. King notes that misconceptions concerning the nature and application of TJ have hindered the wider adoption of TJ by the judiciary.⁹⁵

One of the frequent criticisms of problem-solving courts is that they divert resources from existing programs or privilege certain classes of offenders over others in the competition for scarce resources.⁹⁶ New York State Supreme Court Judge Phylis Bamberger cautions that the focus on specialised courts may risk the diversion of

⁹² *Op cit*, p183.

⁹³ Kieran McGrath, Child Welfare Consultant, Dublin. Comment to web forum tisp@topica.com, 11/7/12.

⁹⁴ These recommendations can be found at National Association of Criminal Defense Lawyers (2009), *ibid*, accessed August 2012, pp54-55.

⁹⁵ King, M (2011), 'Therapeutic Jurisprudence's Challenge to the Judiciary', 1 Alaska Journal of Dispute Resolution 1; Monash University Faculty of Law Legal Studies Research Paper No 2011/2. <http://ssrn.com/abstract=2100632>, accessed August 2012.

⁹⁶ King et al (2009), *ibid*, p141.

resources (funding and staffing) from courts of general jurisdiction which also administer alternatives to incarceration. This could disadvantage offenders who do not qualify for consideration by specialist courts for a range of reasons including the following:

- the specifics of their offences disqualify them;
- they are not in the target population of a specialised court;
- they choose not to seek early diversion from the traditional court processes;
- they maintain a plea of 'not guilty'; or
- they have problems other than addiction (such as health issues, learning disabilities, emotional disturbances or homelessness) which are not addressed by all specialised courts.

Bamberger argues that 'all courts should be provided with the panoply of services, including a properly funded probation department, so that alternatives to prison are equally available to all defendants found eligible for them, regardless of the court before which their cases are pending'.⁹⁷

A key uncertainty when introducing case management reforms is whether these measures create additional barriers to accessing the legal system for traditionally disadvantaged litigants. Lorana Bartels, for example, considers that the 'oral incompetence' of defendants in drug courts may increase their vulnerability.⁹⁸

Burns and Peyrot raise the potential complications in mixing coerced treatment and 'voluntary' participation in drug court programs. They identify that drug court defendants may 'consent' to participate in treatment without necessarily seeking a cure or desiring treatment, but simply because participating is the best of a highly undesirable set of options. The 2012 Standards for the San Francisco Collaborative Courts clarifies that 'while coerced and voluntary treatment are equally effective, clients are more likely to engage in an intervention if they have intrinsic motivation to change.'⁹⁹ Therefore, much of the work of drug court judges in responding to defendants involves separating those who genuinely want to recover from those who

⁹⁷ Bamberger, P S (2003), *Ibid*, p1093.

⁹⁸ Personal notes from presentation at Critical Criminology Conference, University of Tasmania, July 2012. Proceedings currently in publication.

⁹⁹ San Francisco Collaborative Courts, Standards, Jan 2012. www.sfsuperiorcourt.org, accessed August 2012.

simply want to avoid incarceration.¹⁰⁰ Further to these concerns, the regulation of participants' living conditions and the frequent drug testing they undergo involves some loss of privacy, disclosure of otherwise confidential medical information and a measure of coercion – plus the risk, if they do not complete treatment, of an incarceration sentence longer than that which typically results from a plea bargain or an adjudicative disposition.¹⁰¹

Burns and Peyrot note that the success of using screening assessments to determine the suitability of candidates for participation in drug court programs (and to screen out clients who are least likely to benefit from the program) will be reflected in enhanced success rates of the programs, which cannot then be compared fairly with success rates for traditional criminal courts.¹⁰²

A further criticism of problem-solving courts suggests that best practice should focus on the role of the individual (rather than that of the court) as the key agent of change. The court should support change through a solution-focussed approach, instead of a more disempowering problem-solving orientation.¹⁰³ This shift is already underway and is particularly relevant to recent developments in Australian practice.

American and Canadian drug courts have been criticised for their potential for net-widening and this is clearly a danger where the target group is the less serious offender. However, in Australia, drug courts have been targeted at relatively serious offenders with moderate or extensive criminal records.¹⁰⁴

King et al (2009) note that court programs are often too narrow to cater for the rehabilitation needs of individual offenders, for example targeting illicit drug use but not alcohol or solvent abuse. A history of violence will also preclude many offenders from participating in a drug court or court diversion program because of specific exclusion criteria.¹⁰⁵

Concerns have been raised that although problem-solving courts can be highly rewarding, they can also be stressful and judges are in danger of 'burning out'.

¹⁰⁰ Burns, S & Peyrot, M (2003), *ibid*, p423 & 425.

¹⁰¹ *Op cit*, p434.

¹⁰² Burns, S & Peyrot, M (2003), *ibid*, p424.

¹⁰³ AIJA website, Problem-Solving Courts, *ibid*, accessed 23/6/11.

¹⁰⁴ King et al (2009), *ibid*, p146.

¹⁰⁵ *Op cit*, p164.

Suitable replacements can be difficult to find, which may result in the failure of such courts in smaller jurisdictions. There is no best practice standard enshrined in a judicial code of practice for judging in these courts, although judicial benchbooks are certainly making a substantial contribution in this regard.¹⁰⁶ The degree to which TJ principles are applied in judging depends largely on the character, training and motivation of the individual judicial officer.¹⁰⁷ Furthermore, some who work in the drug rehabilitation world fear that 'only criminals will get treatment', to the detriment of drug users who do not commit crimes to support their habits.¹⁰⁸

Some responses to the critics

King et al conclude that TJ can limit negative side effects of the law and promote justice system outcomes such as conflict prevention and resolution, respect for the law and offender rehabilitation. They find these criticisms 'difficult to reconcile with its influence in judicial and legal work and legal education . . . TJ promotes therapeutic principles such as voice, validation, respect, self-determination . . . and an ethic of care', which is why TJ is so important, as it aspires to respect legal principles but at the same time to bring the knowledge from other disciplines, common sense and the protection of the vulnerable, into the legal discourse.¹⁰⁹ As noted by King et al, 'it appears that the dilemmas are less stark and the conflicts resolvable'.¹¹⁰

Recognition that resources are needed has seen the growth of a host of initiatives that support the courts, before or after plea, on bail or as part of a sentence, providing assistance to a wide range of offenders.¹¹¹ But pending an 'ideal world' in which a full range of services is available to all offenders, the pragmatic response appears to be to focus these resources in a smaller number of courts that can deal with the more difficult and expensive cases. These courts can act as points of

¹⁰⁶ See for example The Drug Court Judicial Benchbook produced by the National Drug Court Institute in the USA, *ibid*, accessed August 2012.

¹⁰⁷ King et al (2009), *ibid*, p168.

¹⁰⁸ Hargreaves, G (2007), 'Drug courts target cycle of crime', BBC News, http://news.bbc.co.uk/2/hi/uk_news/6617317.stm, accessed 3/1/12.

¹⁰⁹ Kieran McGrath, Child Welfare Consultant, Dublin. Comment to web forum tjsp@topica.com, 11/7/12.

¹¹⁰ King et al (2009), *ibid*, p168-9.

¹¹¹ *Op cit*, p141.

referral from general courts, centres of expertise and training for staff and foci of research and evaluation.¹¹²

Another approach, being developed by the Center for Court Innovation in New York, is to integrate a problem-solving orientation into the mainstream judicial system.¹¹³ Interest in how TJ might be used in a broader context, or 'mainstreaming' TJ, is a matter attracting current high-level attention within the global TJ community.¹¹⁴

Advocates for access to justice argue that recommendations relating to ensuring greater equality in access to justice are in fact likely to have the additional effects of increasing the efficiency of the justice system, reducing the costs of litigation and providing a more effective and just system.¹¹⁵ As Burns and Peyrot find, drug courts operate on the basis of the belief that some defendants genuinely suffer from addictions that restrict their ability to behave as autonomous, rational actors; as a result, these defendants may actually benefit from a decrease in their legal rights by virtue of the fact that understanding of their disability has now been incorporated into the operation of the criminal justice system.¹¹⁶

From the economic rational perspective, the potential savings to the community to be gained by treating drug addicts who fund their use through crime are considerably greater than for those who do not, although clearly equity and human rights considerations would dictate that treatment services should be available to all those in need.

My experiences of both mainstream and drug courts in Tasmania and around the world and my reading of a considerable body of literature in this field leads me inexorably to the conclusion that applying a therapeutic approach in court dealings with selected seriously drug-addicted offenders is a worthwhile and valuable

¹¹² *Op cit*, p165.

¹¹³ For a discussion of this approach, see King et al (2009), pp165-7; Magistrate Pauline Spencer (2012), 'To dream the impossible dream? Therapeutic jurisprudence in mainstream courts', 2012 International Conference on Law and Society, <http://ssrn.com/abstract=2083370>, accessed August 2012, and Michael King (2011), *ibid*, accessed August 2012.

¹¹⁴ Magistrate Jelena Popovic (Victoria, Australia), Magistrate Pauline Spencer (Victoria, Australia), Magistrate Michael King (Western Australia), Professor Michael Jones (Phoenix School of Law faculty and Ret. Judge, Maricopa County, Arizona), and Professor David Wexler (University of Puerto Rico and Emeritus Professor at University of Arizona) have recently written about or are actively working on 'mainstreaming TJ', and have joined together as an informal committee to promote this effort. See tjsp@topica.com 19/8/12.

¹¹⁵ King et al (2009), *ibid*, p17.

¹¹⁶ Burns, S and Peyrot, M (2003), *ibid*, p435.

initiative. Although much progress has been made in a short timeframe, challenges remain to be overcome. Programs must be able to demonstrate effectiveness and cost-effectiveness in order to attract the funding required for their ongoing survival in a time of intense scrutiny of public expenditure. For this reason, evaluation of drug courts must be objective, rigorous and comprehensive and must be able to provide useful data to inform government policy and funding decisions. The following chapter will examine a number of issues raised by the evaluation process.



Queens Drug Treatment Court, New York. (March 2012)

Part B: Evaluating success in drug courts

Chapter 4 - Issues in evaluation

Theoretical and methodological approaches to evaluation

There is substantial literature on the processes and complexities of evaluation as applied to specific fields such as drug courts. I have focussed on the issues raised by Carol Weiss and Lawrence Sherman, both of whom are highly respected authorities within this field.

Carol Weiss

Carol Weiss examines the role of evaluation – a process of using systematic assessment of processes and outcomes to improve programs and policies – in supporting social programs, recognising the complexities of the political environment and the need to craft evaluations to fit their contexts.¹¹⁷ She notes that social programs are often established and maintained for reasons other than their stated goals, and that these political contexts can entail resistance to change and a resistance to the efforts of evaluators. She sees the purposes of evaluation as enlightenment, decision-making and organisational learning, and recognises the value of incremental change, noting that ‘cumulative increments are not such small potatoes after all.’ In discussing how cost-benefit and cost-efficiency analyses can be used to operationalise judgements of value, she highlights the difficulty of combining pragmatic wisdom with specific guidance, and notes the importance of involving those with substantial experience in that ‘judgement calls have to be repeatedly made’.¹¹⁸

Weiss describes the many tensions that must be managed in designing and conducting evaluations of social programs, such as that between evaluation theorists

¹¹⁷ Weiss, Carol H (1972), *Evaluation Research: Methods of Assessing Program Effectiveness*. Englewood Cliffs, NJ: Prentice-Hall.

¹¹⁸ Julnes, George (2001), ‘Book Review: Evaluation (2nd edition)’, *American Journal of Evaluation* 2001, 22: 265. <http://aje.sagepub.com/content/22/2/265>, accessed 16/8/12.

with respect to the proper role of evaluators. Some believe they should remain as neutral as possible to retain credibility, and others insist that they need to acknowledge the values they bring to the situation and become actively engaged in promoting particular values. In an emerging field such as drug courts, it is necessary to objectively provide rigorous evidence of effectiveness in order to inform government policy and funding decisions.

Like most social researchers, Weiss sees evaluation as an instrument of moderate social reform which relates the efforts of service agencies to desired outcomes for recipients of services. Working within the framework set by their clients, evaluative researchers are seen as aiding in the articulation of service goals, designing and conducting studies which determine the extent to which service objectives are accomplished, and taking initiative in urging that evaluation results be incorporated in policy and programing decisions. Unlike other social scientists who attribute the frequent shortcomings of evaluation studies to problems in the political and administrative context in which social programs are conducted, Weiss stresses strategies which social researchers can employ to make useful contributions in spite of serious obstacles.¹¹⁹

Lawrence Sherman

Lawrence Sherman's work on evaluation is a theoretically informed empirical exploration of the varying (and changing) ways in which subgroups that are differentially socially situated interact with criminal justice interventions, the main currency of those interactions relating to reasoning and resources.¹²⁰ He argues that criminal justice policies and practices in general could be substantially improved by more systematic attention to evidence about the effects of what is delivered. Additionally, better use might be made of past research, where systematic synthesis promises more than a simple catalogue of individual findings. He is a realist in that he is concerned with conducting applied criminological research that speaks to the real and diverse conditions in which criminal justice interventions have to be delivered; the structure of his theories accords with scientific realism; and his pragmatic use of diverse sources of data and methods of data-collection in testing

¹¹⁹ Francis Caro, (Brandeis University), in *Public Opinion Quarterly*, ISSN 0033-362X, 1972, Volume 36, Issue 4, p. 640. Downloaded from <http://poq.oxfordjournals.org/>. Accessed 16/8/12.

¹²⁰ Lawrence Sherman et al (eds) (2002), *Evidence-based Crime Prevention*. London: Routledge.

and refining those theories is realistic about the sources of evidence that are available and can be used.¹²¹

Sherman believes that uninformed discretion and uninformed directed policy and practice are liable to be more harmful and less beneficial than either when it is informed by evidence. Yet he emphasises the chronic fallibility of human understanding and the importance of adopting positions which challenge orthodoxies that may turn out to be mistaken. He is a strong advocate of randomised controlled trials (RCTs) and of a medical model for developing improvements in criminal justice policy and practice.

Nick Tilley critiques Sherman's acceptance of RCTs as 'a taken-for-granted gold standard', and identifies some well-known problems in their application to criminal justice. For example, social programs and responses to them change over time; differing sub-groups interact with program components in different ways; and there can be no certainty that those selected randomly to treatment and control conditions from specific populations at one place and time can be treated as representative of all or even any given set of populations. Moreover, most social programs involve multiple interventions and the reason for apparent success may be unclear. Hence, what needs to be replicated to expect similar outcomes may not be clear. Indeed, King et al (2009) note that if drug courts are successful in meeting their objectives, whether they be reducing recidivism rates, improving health or social outcomes or court processes, it is often unclear what the causal factor is, and it is therefore difficult to know what to enhance, replicate or discontinue.¹²²

A number of methodological concerns regarding drug court evaluations have been identified, including inappropriate or non-comparable control groups, difficulties in determining true program effects in programs with multiple elements, inadequate follow-up periods and limited information about costs and benefits.¹²³ Issues which must be carefully considered in evaluating drug court effectiveness include definitions of values (of the program itself, participants, other stakeholders and researchers) and matters of due process, rights and obligations and diversity.

¹²¹ Nick Tilley (University College, London, UK), (2009), 'Sherman vs Sherman: Realism vs rhetoric', in *Criminology and Criminal Justice*, Vol 9 (2), pp 135-144. <http://cri.sagepub.com/content/9/2/135>, accessed 19/6/12.

¹²² King et al (2009), *ibid*, p165.

¹²³ *Op cit*, p167.

A common challenge in designing an evaluation scheme for Drug Treatment Courts (DTCs) is the establishment of a valid and meaningful comparison group. Previous unpublished evaluations of the Toronto and Vancouver DTCs have been substantially critiqued on the basis of methodological weaknesses, including limited follow up durations and unmatched comparison groups.¹²⁴

In the process of their 2009 review, Gutierrez and Bourgon identified two major methodological flaws that commonly recurred in primary research on DTCs: failure to use an intent-to-treat analysis (eg analysing program graduates only); and pre-existing differences between treatment and comparison groups, in addition to low adherence to the Risk-Needs-Responsivity principles.¹²⁵

The first generation of research on drug court programs addresses the basic question of whether programs can be effective under typical conditions. These studies do not consider the more important questions of who programs are most effective for (target populations), how to make them most efficient and cost-effective, and how to avoid any negative side effects they might produce.

The second generation of research delves beyond the average effects of intervention to identify the factors that distinguish effective programs from those that are ineffective or harmful. This is referred to as research on best practices. Evaluators compare the characteristics of programs with significant positive outcomes to those with poor or insignificant outcomes, although without the benefit of experimental controls. Drug courts are now focusing their attention on characterising the attributes of exemplary programs and identifying the attributes that are lacking in a small subgroup of poorly performing drug courts.¹²⁶

Meredith Cosden, who has evaluated the Santa Barbara drug court for the University of California (Santa Barbara), cites typical issues in evaluating such programs as how success is defined and measured and ensuring similar entities are compared (eg factors such as program length and the severity of

¹²⁴ Somers et al (submitted to *International Journal of Drug Policy*, as yet unpublished), 'Drug Treatment Court of Vancouver: An Empirical Evaluation of Recidivism, p2.

¹²⁵ *Loc cit.*

¹²⁶ Marlowe (2012), *ibid*, accessed 4/8/12.

problems being addressed). Program structures and requirements may vary considerably, and it is important to compare like components when extrapolating results.¹²⁷

The following dialogue about methodology formed a contribution to an international web forum about therapeutic jurisprudence on 15/9/12.¹²⁸

Throughout the world, won't the outcome of "good research" about the benefits, costs, and risks of programs for offenders depend on the methodology as well as on the data? Should the TJ community come up with (discover, re-discover or develop) sound metrics so that we can better understand the value of what we are doing and then explain our conclusions to the news media and governing authorities? Shouldn't there be a generally accepted methodology which goes beyond the immediate and attempts to measure and quantify factors which are commonly overlooked - including those human consequences which are often ignored as intangible? And shouldn't such a methodology, if sound, be raised as the standard whenever folks claim they are having a fact-based policy discussion about criminal justice programs?

Aren't we largely talking about social science research? Can criminologists, penologists, sociologists, economists, actuaries and statisticians help TJ? If the argument over imprisonment is going to be about the economics of it, then I hope TJ will be able to weigh in with strong methodology as well as facts. In those countries where the lingua is in "dollars and cents," then I would like to hear TJ speaking "dollars and sense." (Joe Beeler)

The key is sustainability backed by good research. When the global financial crisis began in the U.S. there was a move to close "unnecessary programs" like drug courts. Thank goodness it was short-lived. We actually developed media packages and talking points to address lawmakers to reverse the trend. Every week new courts are opening. Involvement of the community and policy makers also tends to develop

¹²⁷ Personal interview with Dr Meredith Cosden, 1/3/12.

¹²⁸ tjsp@topica.com, 15/9/12.

fidelity to the courts and prevents them from closing. There should have been huge community support for these courts and protests against their closure. We have to assume people do not know of our good work and constantly remind them of what we're doing – making the community safer, saving money and saving lives. (Peggy Hora)

How success is defined and measured by a particular drug court will impact the outcomes of any evaluation. This applies both to the success of individual participants and to the success of the program. Individual success will be affected by the length of the program, the severity of the problems being addressed and the response of the court to lapses and relapses. The National Association of Criminal Defense Lawyers cautions against 'skimming', the process through which some problem-solving courts gain cases involving low-risk defendants most likely to succeed rather than high-risk defendants who most need treatment.¹²⁹ The assessment process is crucial and must be rigorous in ensuring that the participants are the best candidates for the program, accounting for varying factors.

It is also important that the criteria for achieving success are realistic within the context of the client group. For example, given that many programs deal with the most complex and recalcitrant offenders who are assessed as both high risk and as high needs, it would be unrealistic to limit the definition of success to program completion, abstinence from drug use and cessation of offending. Rather, progress could be more realistically measured by extent of engagement in the program, degree of compliance with conditions, reductions in drug use and reductions in the frequency and severity of crime committed.

Where Weiss takes a practical approach to the application of evaluative theory, concluding that evaluation should be conducted despite imperfections in the process and Sherman takes a more academic position as a scientific idealist, Pawson and Tilley¹³⁰ consider the importance of contextual information in program evaluation ('what works for whom in what circumstances, in what

¹²⁹ NACDL (2009), *ibid*, p60.

¹³⁰ Pawson, Ray & Tilley, Nick (1997), *Realistic Evaluation*. London: Sage.

respects, and how?')¹³¹ This approach accords with the difficulties expressed in my interview with Cosden in comparing programs with different characteristics and according to different criteria. It is helpful in the endeavour of 'capturing success' to be clear about what constitutes success and how that information can be collected and compared.

My own research and practice in this area suggests that the tools which are generally employed for evaluative purposes, such as the Level of Service / Case Management Inventory (LS/CMI) and the Addiction Severity Index (ASI), have characteristics which limit their effectiveness for the purpose of providing comprehensive feedback. As actuarial tools they reduce human behaviour in many forms to a numeric value, which, although useful quantitatively and for comparing data sets, is limited in terms of providing meaningful qualitative data.

In addition, these tools are deficit-based by design, seeking to identify factors which represent criminogenic risk and needs. They do not attempt to capture positive impacts: rather they reflect reductions in negative scores. There is merit in the application of these tools to the specific purpose of measuring risk reduction in individuals, but for the purpose of program evaluation in order to support funding applications, for example, it seems that a more comprehensive evaluative process is called for. An exit interview outcome for program participants could be a more holistic and positive assessment of progress across a range of sectors, rather than being represented simply as a reduction from Very High to Low Risk of reoffending. This discussion will be developed further with respect to the Tasmanian situation in Chapter 8.

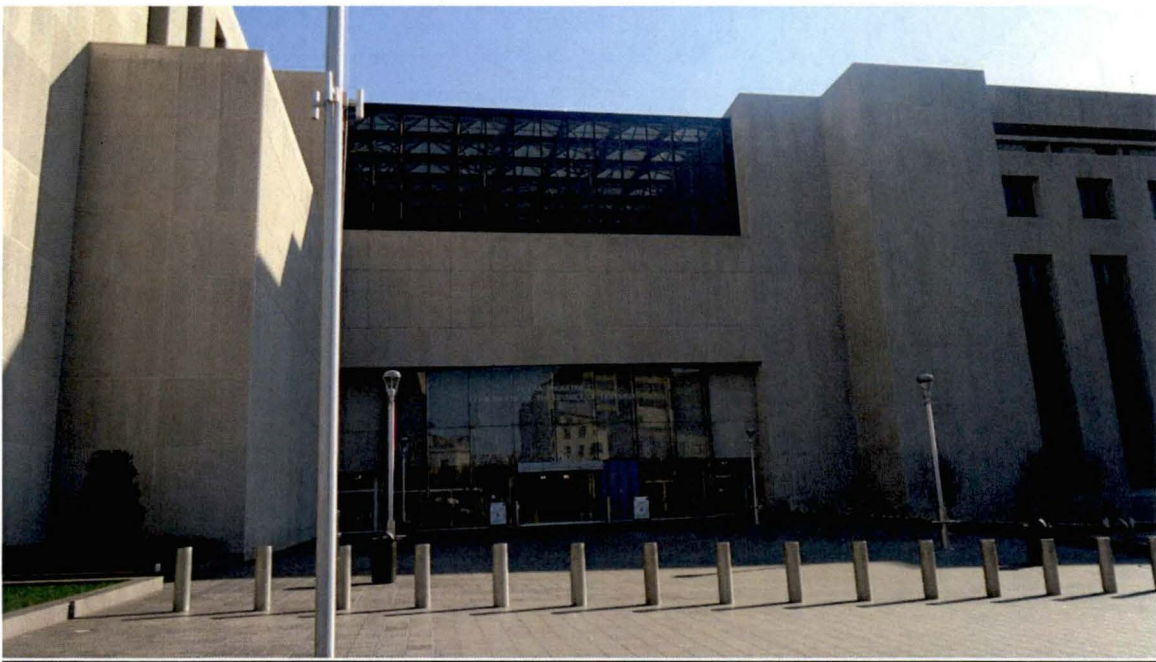
Cultural context

Cavadino and Dignan demonstrate that a society's penal ideology, culture and practices will shape and be shaped by its material conditions, the more general and penal ideology and the culture of the society.¹³² This is relevant to both the evaluation process itself and to the adaptation which must occur in order to transpose processes and systems from one cultural context to another.

¹³¹ Pawson, Ray & Tilley, Nick (2004), 'Realist Evaluation'. London: British Cabinet Office.

¹³² Cavadino & Dignan (2006), *ibid*, p13.

Nolan discusses the notion of 'international transference' with respect to evaluation, and reminds us that the relevance of efficacy and the meaning of success must be understood as culturally determined, and that the answers to questions such as 'Who defines success?', 'What is a therapeutic outcome?' and 'By whose standards?' presuppose and are determined by particular cultural assumptions. 'Embedded in American problem-solving courts are cultural assumptions that significantly challenge long-held understandings of the meaning and practice of justice – assumptions that when transplanted along with problem-solving courts may significantly challenge or alter the legal cultures of importing countries.' He advises that countries importing problem-solving courts require a deeper understanding of the ongoing dialectic between law and culture, and must contend with these difficulties, either by rejecting certain parts of the American export or by adjusting the programs in such a manner as to make them more suitable to their new context.¹³³



Part of the Washington DC court complex. (March 2012)

¹³³ Nolan, J (2009), *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement*. New Jersey: Princeton University Press, pp4-6.

Chapter 5 – Evaluations of success - Reductions in recidivism

Results from around the world

An extensive body of empirical evidence shows that the creation of problem solving courts in the United States has produced remarkable results in terms of reoffending, cost and impact on the community.¹³⁴ Drug court advocates maintain that drug courts have thus far accomplished much and even saved lives.¹³⁵ Marlowe points out that the effectiveness of adult drug courts is not a matter of conjecture:

It is the product of more than two decades of exhaustive scientific research. From their inception, drug courts embraced science like no other criminal justice program. They endorsed best practices and evidence-based practices; invited evaluators to measure their outcomes; and encouraged federal agencies as well as a myriad of state agencies to issue calls to the scientific community to closely examine the model and learn what makes it tick and how it might be improved. The result? We know beyond reasonable doubt that Drug Courts significantly reduce drug use and crime and so on with substantial cost savings.¹³⁶

As American drug courts have been in operation for longer than their Australian counterparts, their evaluations are more extensive. King et al (2009)¹³⁷ summarise the findings of a number of studies:

- the longer participants stay in treatment, the better the outcomes;
- drug court participants have lower rates of recidivism and drug use while still in the program than comparison groups;

¹³⁴ Martine Herzog-Evans (2011), *ibid*, accessed June 2012.

¹³⁵ Burns, S & Peyrot, M, (2003), *ibid*, p434.

¹³⁶ Marlowe, D (2010), 'Research Update on Adult Drug Courts', *Need to Know*, National Association of Drug Court Professionals, www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf, accessed 4/8/12.

¹³⁷ King et al (2009), *ibid*, p147.

- even without treatment, graduated sanctions can have a statistically significant impact on offenders' behaviour;
- the certainty and severity of drug court sanctions are crucial to the model's effectiveness; and
- there are significant savings to the criminal justice system compared to traditional adjudication.

The National Association for Drug Court Professionals emphatically states the following:¹³⁸

'Drug Courts Work

75% of Adult Criminal Drug Court graduates never see another pair of handcuffs...

THE VERDICT IS IN...

In 20 years since the first Drug Court was founded, there has been more research published on the effects of Drug Courts than on virtually all other criminal justice programs combined.

The scientific community has put Drug Courts under a microscope and concluded that Drug Courts work. Better than jail or prison. Better than probation and treatment alone. Drug Courts significantly reduce drug use and crime and are more cost-effective than any other proven criminal justice strategy.'

The NADCP provides detailed facts and figures demonstrating that drug courts reduce crime, save money, ensure compliance, combat drug addiction and restore families:¹³⁹

+ Drug Courts Reduce Crime

- FACT: Nationwide, 75% of Drug Court graduates remain arrest-free at least two years after leaving the program.

¹³⁸ www.nadpc.org/learn/facts-and-figures, accessed 20/10/11 and 4/8/12, and www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf, accessed 4/8/12.

¹³⁹ See also Shannon Carey, Ph.D, Juliette Mackin, Ph.D & Mike Finigan, Ph.D, *What Works: Best Practice in Adult Drug Courts. New Findings form the latest research.* www.npcresearch.com/Files/Conference%20presentations/NADCP_2011_Best_Practices_Top_10_0711.pdf, accessed 20/10/11

- FACT: Rigorous studies examining long-term outcomes of individual Drug Courts have found that reductions in crime last at least 3 years and can endure for over 14 years.
- FACT: The most rigorous and conservative scientific “meta-analyses” have all concluded that Drug Courts significantly reduce crime as much as 35 percent more than other sentencing options.

+ Drug Courts Save Money

- FACT: Nationwide, for every \$1.00 invested in Drug Court, taxpayers save as much as \$3.36 in avoided criminal justice costs alone.
- FACT: When considering other cost offsets such as savings from reduced victimization and healthcare service utilization, studies have shown benefits range up to \$12 for every \$1 invested.
- FACT: Drug Courts produce cost savings ranging from \$4,000 to \$12,000 per client. These cost savings reflect reduced prison costs, reduced revolving-door arrests and trials, and reduced victimization.
- FACT: In 2007, for every Federal dollar invested in Drug Court, \$9.00 was leveraged in state funding.

+ Drug Courts Ensure Compliance

- FACT: Unless substance abusing/addicted offenders are regularly supervised by a judge and held accountable, 70% drop out of treatment prematurely.
- FACT: Drug Courts provide more comprehensive and closer supervision than other community-based supervision programs.
- FACT: Drug Courts are six times more likely to keep offenders in treatment long enough for them to get better.

+ Drug Courts Combat Meth Addiction

- FACT: For methamphetamine-addicted people, Drug Courts increase treatment program graduation rates by nearly 80%.
- FACT: When compared to eight other programs, Drug Courts quadrupled the length of abstinence from methamphetamine.
- FACT: Drug Courts reduce methamphetamine use by more than 50% compared to outpatient treatment alone.

+ Drug Courts Restore Families

- FACT: Parents in Family Drug Court are more likely to go to treatment and complete it.
- FACT: Children of Family Drug Court participants spend significantly less time in out-of-home placements such as foster care.

- FACT: Family re-unification rates are 50% higher for Family Drug Court participants'.¹⁴⁰

A comprehensive review of independent evaluations of 92 adult drug courts, 34 juvenile drug courts and 28 drink-driving (DWI) courts from the USA, Australia, Canada, New Zealand and Guam was completed in 2012. The review assessed each court's effectiveness on three outcomes: general re-arrest for any offence, drug related re-arrest and drug use (self-reported or urine tested) for each type of court. The findings strongly support the effectiveness of adult drug courts, as even the most rigorous evaluations consistently find reductions in recidivism and these effects generally persist for at least three years. The magnitude of this effect is analogous to a drop in general and drug-related recidivism from 50% for non-participants to approximately 38% for participants. Smaller effects on recidivism were found for juvenile drug courts.¹⁴¹

A study of 256 felony participants from drug courts in Kansas City, Missouri, and Pensacola, Florida, found recidivism rates fell by about 30% in each court. The results from similar, earlier studies are summarised in the table below.¹⁴²

Place	Study Date	Drug Court Recidivism Rate	Other Defendant's Recidivism Rate
Dade County, Florida	1993	33%	48% - 55%
New York City	1993	53.5%	51%
Phoenix	1995	30%	30%
Washington, DC	1998	19%	27%
2 Florida counties	1998	48% / 26%	63% / 55%
Portland	1998	36%	153%

¹⁴⁰ See also Shannon Carey, Ph.D, Juliette Mackin, Ph.D & Mike Finigan, Ph.D, *What Works: Best Practice in Adult Drug Courts. New Findings form the latest research.* www.npcresearch.com/Files/Conference%20presentations/NADCP_2011_Best_Practices_Top_10_0711.pdf, accessed 20/10/11.

¹⁴¹ Mitchell, O, Wilson, D, Eggers, MacKenzie, D (2012), 'Drug Courts Effects on Criminal Offending for Juveniles and Adults', *Campbell Systematic Reviews* 2012:4. DOI:10.4073. <http://campbellcollaboration.org/lib/project/74/>, accessed 24/6/12.

¹⁴² Roberts, K (2012), 'Focus on Problem-Solving Courts', *The Judges Journal*, Vol 51, No 2, Spring 2012, p39.

NPC in Oregon has conducted an extensive body of qualitative research on both recidivism rates and costs as they relate to the ten Key Components of drug courts.¹⁴³ Between 2000 and 2006 evaluations of over 30 adult drug courts were conducted, and 18 of these were highlighted because of similarities in available data and methodology. The study describes the relationship between specific practices and three outcome measures: graduation, investment cost in drug courts and improvement in outcome costs. The ‘Logic Model’ used by NPC to examine drug court performance is included in Appendix 2.

The result of this research is a list of factors (‘promising practices’) which were significantly associated with courts’ compliance with each of the 10 Key Components. The practices were associated (negatively or positively) with outcomes and costs, and 27 practices related to positive cost outcomes were identified. These are listed in Appendix 3.

Five meta-analyses¹⁴⁴ have been conducted on drug courts in the USA. The findings of this extensive research are summarised in the tables below. All the studies report superior effects for Drug Courts over randomised or matched comparison samples of drug offenders, and revealed that Drug Courts significantly reduced re-arrest or reconviction rates by an average of approximately 8% to 26%, with the average reflecting approximately a 10 to 15% reduction in recidivism.¹⁴⁵

Citation	Institution	Number of Drug Courts	Crime Reduced on average by:
Wilson et al (2006)	Campbell Collaborative	55	14% to 26%
Latimer et al (2006)	Canada Dept. of Justice	66	14%

¹⁴³ NPC Research (Carey, S, Finigan, M and Pukstas, K) (2008) ‘Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes and Costs,’ http://www.npcresearch.com/Files/NIJ_Cross-site_Executive_Summary_0308.pdf, accessed August 2012.

¹⁴⁴ Meta-analysis is an advanced statistical procedure that yields a conservative and rigorous estimate of the average effects of an intervention. It involves systematically reviewing the research literature, selecting out only those studies that are scientifically defensible according to standardised criteria, and statistically averaging the effects of the intervention across the good-quality studies. See Marlowe (2010), *ibid*.

¹⁴⁵ Data provided by Judge Peggy Hora (ret), 22/1/12, <http://judgehora.com>. See also Marlowe (2010), *ibid*, accessed 4/8/12.

Shaffer (2006)	University of Nevada	76	9%
Lowenkamp et al (2005)	University of Cincinnati	22	8%
Aos et al (2006)	Washington State Institute for Public Policy	57	8%

Marlowe points out that these average figures mask the best drug court performances. For example, 78% of the courts were found to have significantly reduced crime, by as much as 35 to 40%, and recidivism reductions were shown to last at least three years post-entry and up to 14 years.

A more recent (2009) meta-analysis by Gutierrez and Bourgon included only studies with robust methodologies and concluded that the least biased estimates of drug treatment courts (DTCs) on reducing recidivism was a more modest 8%.¹⁴⁶

In 2005 the US Government Accountability Office (GAO) likewise concluded that Drug Courts reduce crime, and the later five year Multisite Adult Drug Court Evaluation (MADCE) conducted by the National Institute of Justice examined participant outcomes in 23 adult Drug Courts located in seven regions across the country, compared to similar defendants in conventional case processing. It found 'vivid evidence that drug courts are effective at reducing both substance abuse and crime', and also improved participants' psychosocial functioning. Drug court participants were found to be one-third less likely to report using drugs 18 months after their enrolment in the program.¹⁴⁷ The study also reported improvements in family relationships, higher employment rates and higher annual incomes for participants,¹⁴⁸ and it revealed a number of practices that were associated with better results.¹⁴⁹

¹⁴⁶ Somers, J et al, (unpublished, 2012), *ibid*, p2.

¹⁴⁷ www.courtinnovation.org/sites/default/files/documents/MADCE_ES.pdf, accessed June, July & August 2012. The Center for Court Innovation has been an active player in the drug court field, developing New York City's first drug court, providing technical assistance across the country, and advancing knowledge through research, reflection, and technology.

¹⁴⁸ Marlow (2010), *ibid*.

¹⁴⁹ *Op cit*, p3.

A recent study of recidivism in Alaska's Therapeutic Courts for Addictions¹⁵⁰ found that *any* participation by felons in a therapeutic court program appeared to be beneficial; all participants had lower rearrest and reconviction rates than comparison offenders. Graduates benefitted the most. The rearrest rate for felon graduates was about one-third lower than the comparison group, and the reconviction rate was about one-half that of the comparison offenders.

A 2012 study of the program policies and procedures, services offered and outcomes produced from a large sample of 69 drug courts in several US states employed a parallel methodology allowing researchers to examine common factors influencing effectiveness and cost-effectiveness across most of the jurisdictions. The results lent substantial support to many of the Key Components of drug courts.¹⁵¹

Analysis of several DTCs in the US found graduation rates ranging from 29% to 48% with programs ranging from 12 to 18 months in duration found to be more effective than shorter or longer programs. Despite high initial rates of program drop-out and non-completion, for those individuals who graduate, recidivism rates are lower compared to those sentenced through the traditional court system.¹⁵²

Researchers examining the Baltimore City, Maryland, Drug Treatment Court over a three year period from 2000 found that participants demonstrated substantially lower rates of recidivism as compared to the comparison sample. They were arrested 31.4% fewer times overall, and 35.3% fewer times for offences involving drugs, property and crimes against the person. This increased to 48% fewer arrests for crimes against the person and 62.3% fewer arrests on drugs charges.¹⁵³

Evaluation of the Washington DC experimental interventions on drug-involved defendants measured the impact of the programs on defendants' drug use, criminal activity and social and economic functioning. In 2000 it reported that participants were significantly less likely to be arrested in the year following sentencing, and that

¹⁵⁰ Carns, T, Cohn, L and Martin, S (2012), 'Recidivism in Alaska's Therapeutic Courts for Addictions and Department of Corrections Institutional Substance Abuse Programs', Institute of Social and Economic Research, University of Alaska. www.ajc.state.ak.us/2012programrecid.pdf

¹⁵¹ Marlowe (2012), *ibid*, p2.

¹⁵² Somers et al (2012), *ibid*, p2.

¹⁵³ Crumpton, D, Brekhus, J, Weller, J and Finigan, M (2003), 'Cost Analysis of Baltimore City, Maryland, Drug Treatment Court', NPC Research, www.npcresearch.com, pp6-7.

defendants' drug use reduced during pretrial release. Fewer drug related social problems were also reported in the year after sentencing. For example, participants were less likely to have an accident with a car or other vehicle or to argue with others while under the influence of drugs.¹⁵⁴

Evaluation of the Santa Barbara County Substance Abuse Treatment Courts by the University of California Santa Barbara (UCSB) observed an average graduation rate of 50% from 2001 to 2011. A number of evaluated drug courts across the US have reported that program completion is the most consistent variable associated with post program recidivism, both in frequency of and time to rearrest.¹⁵⁵

An as yet unpublished empirical evaluation of the Drug Treatment Court of Vancouver (DTCV) finds that compared to the matched group of offenders, DTCV participants exhibited significantly greater reductions in offending and a significant decrease in drug-related offences. The evaluation also considers utilisation of health and social services including social security benefits paid and hospital days attributable to substance use disorders. These findings add to the growing evidence that supports the effectiveness of DTCs in relation to the goal of reducing recidivism in a population with diverse and complex needs.¹⁵⁶

Early evaluation of the West London Drugs Court pilot, showed a 23% reduction in 'non-motor' theft compared to figures for the previous year. The court found that the longer people stayed on their Drug Rehabilitation Requirement the less likely they were to be arrested for theft. About 60% of those on orders were not convicted of any offences during the order.¹⁵⁷ Judge Justin Phillips, who pioneered this court and is now retired, found from his own figures that 20% of clients of the court were completely drug free by the end of the treatment order, compared to an average from national treatment agencies across the country of 3%.¹⁵⁸

¹⁵⁴ Harrell, A, Cavanagh, S and Roman, J (2000), 'Evaluation of the DC Superior Court Drug Intervention Programs', National Institute of Justice, *Research in Brief*, US Department of Justice. www.ojp.usdoj.gov/nij

¹⁵⁵ Bureau of Justice Assistance (BJA), (2011), Drug Court Technical Assistance and Clearinghouse Project, Office of Justice Programs, US Dept. of Justice (2011), 'Cost-Benefits/Costs Avoided Reported by Drug Court Programs'. Part Three, pp3 & 7, accessed 4/8/12.

¹⁵⁶ Somers et al (2012, as yet unpublished), *ibid*.

¹⁵⁷ SmartJustice, www.smartjustice.org/indexyoung.html/, accessed 12/1/12.

¹⁵⁸ Arnot, C, 'A touch of familiarity', The Guardian, 22/4/2009. www.guardian.co.uk, accessed 4/1/12.

Ongoing evaluation of the Drug Treatment Court in Ghent, Belgium, consists to date of a qualitative process evaluation based on a literature study, case studies, interviews and focus groups and a quantitative evaluation based on database analysis of an 18 month period between May 2008 and December 2009. The qualitative analysis discusses a range of strengths and weaknesses found in the program, and the quantitative analysis determines that the Drug Court can be considered as 'added value' within the criminal justice system. Rehabilitation programs are developed in 70% of cases and these are completed in about 50% of cases. The evaluation concludes that it would be useful to continue the work of the Drug Treatment Court.¹⁵⁹

Most of the Australian drug court programs have been evaluated, with generally positive and consistent results. Drug court programs have relatively high drop-out rates, but for those who complete the programs it is often the case that their recidivism rate is lower than comparable groups, they take longer to reoffend and their offending rate is lower than it was prior to the program. During the period under supervision, drug use is lower and the offender's health and wellbeing is markedly better. Offenders' engagement and retention in rehabilitation programs is better, employment outcomes are improved and participants are generally positive about their experiences.¹⁶⁰ An evaluation by the NSW Bureau of Crime Statistics and Research of the Parramatta Drug Court trial of intensive judicial supervision found that participants were significantly less likely to return positive drug tests, were less likely to accrue sanctions and had a substantially greater number of episodes of abstinence than participants in standard supervision.¹⁶¹

A 2012 recidivism study of the South Australian Drug Court between 2004 and 2008 showed a 'small program treatment effect' with the incidence of re-apprehension lowest amongst participants who successfully completed the program as compared to those who withdrew or were terminated, and to offenders who were imprisoned and did not take part. Those who completed the program also took considerably

¹⁵⁹ Colman, C, De Keulenaer, S, Thomaes, S, Vander Laenen, F, Vanderplasschen, W and De Ruyver, B, 'Evaluation of the pilot project 'Drug Treatment Court' at the Ghent Court of First Instance', Institute for International Research on Criminal Policy, University of Gent (document not dated but received 10/4/12).

¹⁶⁰ King et al (2009), *ibid*, p147.

¹⁶¹ Jones, C (2011), 'Intensive judicial supervision and drug court outcomes: Interim findings from a randomised controlled trial', *Crime and Justice Bulletin*, No. 152, NSW Bureau of Crime Statistics and Research.

longer in the time to their first offence than either terminates or the prisoner comparison group. This effect was noted up to two years post intervention, suggesting a relatively sustained impact.¹⁶²

A 2009 report from the Queensland Alcohol and Drug Research and Education Centre (QADREC) showed that a majority of Queensland court and police diversion program clients achieve significant decreases in their drug and alcohol use, risk behaviours (such as driving while intoxicated), domestic conflict and psychological distress. These results echo findings by Dr Genevieve Dingle of the University of Queensland School of Psychology and by an independent study by the Australian Institute of Criminology which found recidivism rates for property and drug offences 'significantly lower' among those who successfully completed the program.¹⁶³

Drug courts, then, 'reduce the number of future victims of crime by promoting offender rehabilitation', and are of 'manifest benefit' to local communities.¹⁶⁴

A further measure of success in drug courts is the economic savings that they are able to achieve in the short and the long term.

¹⁶² Ziersch, E and Marshall, J (2012), 'The South Australian Drug Court: A Recidivism Study', Office of Crime Statistics and Research, Attorney-General's Department of South Australia, pp5 & 31.

¹⁶³ tjsp@topica.com, 25/9/12.

¹⁶⁴ White & Graham (2010), *ibid*, p30.



*Hammersmith Magistrates & Youth Courts and
West London County Court. (March 2012)*

Chapter 6 – Evaluations of success - Calculations of cost savings

Examples from around the world

Accounts of problem solving courts do not always provide the kind of solid financial data that policymakers and government agencies increasingly rely upon to make funding decisions in a time of fiscal recession. Because many problem solving courts appear to cost more per case than traditional courts, it would seem crucial to argue not only the humanitarian case but also the financial one. The seminal American financial study, known as CALDATA 1994, tracked 1,821 Californian drug users in treatment and found that, despite an average treatment cost of \$1400 per person, taxpayers saved approximately \$10,000 'with the greatest share of benefit deriving from reductions in the economic burden of crime'.¹⁶⁵ Such studies have the potential to mirror the impact of the justice investment movement in allocating funds differently within the criminal justice system, in order to shift the focus (along with the dollars) from tertiary prevention (containment in custody) to primary prevention (educating entire communities) and secondary prevention (treating 'at risk' communities), and to addressing the underlying social and economic issues which contribute to offending behaviour.

Calculations of drug court costs can range from a crude division of the number of participants into the total of all budget line items related to drug courts, to a much more sophisticated and complex attribution of apportioned costs of the relevant expenses. It can be argued that because a criminal court is a system which has no ability to limit the number of people coming before it, the cost of allocating additional participants to an existing drug court actually adds very little additional expense in real terms. Although the drug court process can involve many additional court appearances by the defendant, most of these will be brief and will not add any material expense to proceedings. Even if sanction days are served during a drug court program, if the participant is ultimately successful, the number of days served

¹⁶⁵ Roberts, K (2012), *ibid*, p1.

will be considerably fewer than would have been the case were s/he subject to traditional proceedings.

These points simply serve to illustrate the complexity of the task of determining the cost of drug court programs, and, as with the use of any statistical data, it is possible to extract from raw figures a number of different interpretations, highlighting the importance of clarity about the goal of the cost analysis. Further investigation of these issues and the application of such an analysis to the Tasmanian drug court program is outside the scope of this research, but could be an interesting avenue for future study.

The field of cost analysis, as applied to drug courts, has been developing significantly during the past several years.¹⁶⁶ Initially, most studies focussed on savings in jail and prison costs associated with the sanctions that would have been applied to defendants in drug court programs had they proceeded through the traditional adjudication process. More recent studies, however, are increasingly taking into account a variety of other cost factors such as:

- Overall criminal justice system costs associated with arrests, prosecutions, adjudication and disposition of drug cases;
- Public health costs associated with drug-related physical illnesses, including costs for emergency room care, hospitalisation, outpatient medical services, nursing home care and medications;
- Costs relating to lost productivity, including workplace accidents and absences, and unemployment;
- Costs relating to drug mortality and premature death;
- Social welfare costs, including foster care and other support of family members;
- Costs related to specific impacts of drug use, including foetal alcohol syndrome and drug exposed infants; drug related AIDS, hepatitis and tuberculosis; and

¹⁶⁶ For example, NPC Research employed the Transactional and Institutional Cost Analysis cost-to-taxpayer approach to assess participants' interactions with multiple taxpayer-funded organisations in examining 30 drug courts across the USA between 2000 and 2006. NPC Research (Carey, S et al) (2008), *ibid*, p2.

- A range of other costs resulting from drug use, including those incurred by crime victims (including lost wages, and medical and mental health care expenses), persons involved in vehicle accidents, substance abuse detox and other treatment services.¹⁶⁷

The range of cost benefit / cost avoidance findings across 97 drug courts in 2001 was reported by American University in Washington DC in 2011. Over 60 individual drug court reports and evaluations studying savings reported in jail/prison costs demonstrated significant savings. Other evaluations revealed substantial savings in reduced pretrial detention and prison incarceration costs as well as in processing costs, fewer arrests and reduced operating costs, with special attention being given to the dollar return on every dollar spent in drug court. Average annual savings per program in jail/prison days amounted to 10,133 days, an estimated average annual cost saving of \$667,694.¹⁶⁸ This was calculated at a minimum incarceration cost of \$40 per day, not including the cost for jail/prison construction and not taking into account the additional prison capacity that is made available through the drug court program, which can be utilised for offenders who are public safety risks.¹⁶⁹

A series of cost analyses has been conducted on drug courts across the USA. The results are summarised in the table below.¹⁷⁰

Citation	No of Drug Courts	Average benefit per \$1 invested	Average Cost Saving per participant
Loman (2004)	1 (St Louis)	\$2.80 to \$6.32	\$2,615 to \$7,707
Finigan et al (2007)	1 (Portland, Oregon)	\$2.63	\$11,000
Carey et al (2006)	9 (California)	\$3.50	\$6,744 to \$12,218

¹⁶⁷ Bureau of Justice Assistance, Drug Court Technical Assistance and Clearinghouse Project, Office of Justice Programs, US Dept. of Justice, (2011), 'Cost-Benefits/Costs Avoided Reported by Drug Court Programs', parts 1-3, pp1-2. Available at www.american.edu/justice, accessed 4/8/12.

¹⁶⁸ This was calculated at a minimum incarceration cost of \$40 per day, not including the cost for jail/prison construction and not taking into account the additional prison capacity that is made available through the drug court program, which can be utilised for offenders who are public safety risks. *Op cit*, pp3-7.

¹⁶⁹ *Op cit*, pp3-7.

¹⁷⁰ Data provided by Judge Peggy Hora (ret), 22/1/12, *ibid*.

Barnoski & Aos (2003)	5 (Washington State)	\$1.74	\$2,888
Aos et al (2006)	National data	n/a	\$4,767
Bhati et al (2008)	National data	\$2.21	n/a

Bhati et al's 2008 analysis demonstrated a 221% 'return on investment'. When drug courts targeted their services to the more serious, high-risk offenders, the average return on investment was even higher - \$3.36 for each \$1.00 invested. Studies taking into account savings from reduced foster care placements and healthcare utilisation show economic benefits from \$2.00 to \$27.00 for every dollar invested. This represents economic benefits to local communities of \$3,000 to \$13,000 per drug court participant.¹⁷¹

The Superior Court of Sacramento County Drug Court was found to have achieved \$20,257,535 in 'recidivism savings' since its inception.¹⁷² Evaluation of a North Dakota Adult Drug Court found that the program decreased incarceration time for participants by at least 75% and up to 88%, and the Bernalillo County Drug Court realised savings of \$247,010 over a four year period.¹⁷³ A series of statewide evaluations found notable additional savings in decreased healthcare expenses, increased employment and decreased victimisation costs.¹⁷⁴

Numerous studies projected further savings into the future – for example the evaluation of the California Drug Courts concluded that 'Court One will, by the fourth year of its operation, recognise additional avoided costs each subsequent year of approximately \$200,000 per year for every 100 participants, and by the ninth year would realise \$1,000,000 saved for every 100 drug court participants.'¹⁷⁵ With 90 adult drug courts operating statewide as of 2002 and drug court caseloads conservatively estimated at 100 participants per year, annual statewide cost savings for adult drug courts suggested by the data are \$18,000,000 per year; and cost offset

¹⁷¹ Marlowe (2010), *ibid*.

¹⁷² *Op cit*, p18.

¹⁷³ *Op cit*, p9.

¹⁷⁴ *Op cit*, p23.

¹⁷⁵ *Op cit*, p30.

and cost avoidance are estimated to be \$43,000,000 per year.¹⁷⁶ The California Department of Alcohol and Drug Programs and the Judicial Council of California reported in 2002 an averted cost saving of nearly 653,000 custody days or \$42,000,000. They note that the incarceration rate for drug court graduates is 83% less during the two years after admission than during the two years prior to program entry.¹⁷⁷

Based on reported information on the status of drug court participants at the time of program entry, significantly less than half were employed, and many were in receipt of public assistance. Most drug courts in the USA require participants to be employed or engaged in full time study as a condition of graduation, and the costs/benefits report of 97 drug courts indicated that over 90% of participants were employed by the time of graduation.¹⁷⁸ The Kentucky Drug Courts assess total avoided costs of state-provided benefits for graduates at \$2,584,562 per participant, increasing to \$4,364,114 when earnings are considered.¹⁷⁹ Evaluation of an Arizona DUI Drug court found that participants make more positive contributions to society during an average month, working more hours each week and spending more time in school, than offenders processed through the traditional court system.¹⁸⁰

In addition, over 3,500 drug court participants who were parents of minor children were reportedly able to regain custody of their children as a result of participating in the drug court. These children had previously been cared for by relatives or in foster care. Over 4,500 additional drug court participants who were in arrears for child support payments at the time of program entry had 'become current' in these payment. An estimate by the Buffalo City Drug Court of the financial benefits derived from foster care savings for 30 children of 143 drug court graduates who were returned to their parents totalled \$488,010. Child support arrearage payments for 16 children of the 143 graduates studied totalled \$96,000.¹⁸¹

¹⁷⁶ *Op cit*, p5.

¹⁷⁷ *Op cit*, p6.

¹⁷⁸ *Op cit*, p34.

¹⁷⁹ *Op cit*, p6.

¹⁸⁰ *Op cit*, p12.

¹⁸¹ *Op cit*, p35.

Reductions in medical and related costs resulting from drug court programs are evident through several indicators, most notably birth of drug-free babies, emergency room visits and related public health costs. Well over 3,000 drug-free babies have been reported born to drug court participants in the USA. Experts estimate that the care and treatment for each child born addicted to drugs costs a minimum of \$250,000 for the first year of life, with additional medical and related costs accruing in subsequent years estimated to be as high as \$750,000 per child by age 18.¹⁸² The drug courts in Virginia have realised estimated savings of \$33,000,000 in the birth of 44 drug-free babies.¹⁸³

Other areas in which drug courts have had demonstrable success in saving public money are by encouraging study and employment, thereby reducing the expenditure of public (welfare) assistance; reuniting parents with children previously in alternative care and addressing child support arrears; and medical costs saved as a result of the birth of drug-free babies, fewer emergency room visits and related public health costs. A series of American statewide evaluations found notable additional savings in decreased healthcare expenses, increased employment and decreased victimisation costs.¹⁸⁴ Social outcome data compiled from 2,892 participants across drug courts in 28 Californian counties indicated that 70% of participants were employed on completion of the program as compared with 62% unemployed on entry. 96% of drug tests were clean and 96% of babies born to participants (132 babies) were born drug free.¹⁸⁵ Evaluation of the Idaho Drug Courts found an annual average wage increase for participants of \$10,748.¹⁸⁶

Drug courts are also achieving substantial cost savings in areas including probation supervision and reductions in unlicensed drivers.¹⁸⁷ Many drug court programs in the US collect participation fees in addition to receiving income from medical insurance and public health funds (Medicaid). Participant fees collected across 45 programs totalled almost \$3,000,000 in 2000.¹⁸⁸ Payments to victims by participants of drug court programs have also been significant. For example,

¹⁸² *Op cit*, p36.

¹⁸³ *Op cit*, p4.

¹⁸⁴ BJA Clearinghouse (2011), *Op cit*, p23.

¹⁸⁵ *Loc cit*.

¹⁸⁶ BJA Clearinghouse (2011), Part Three, *ibid*, p5.

¹⁸⁷ *Op cit*, p37.

¹⁸⁸ *Op cit*, p39.

payments to victims made by the first 1,858 graduates of the New Jersey Adult Drug Courts total \$3.86 million, with an average per participant payment of approximately \$2,078.¹⁸⁹

The 'careful, extensive and recent' US MADCE study comparing 1,781 participants in 23 drug courts across the country with similar defendants in conventional courts over 18 months finds that drug courts cost per participant were 43% more than conventional court costs. But because drug court participants are one-third less likely than conventional court defendants to report using drugs 18 months after participation begins, and commit less than half as many crimes, the net benefit of extra drug court costs was found to be \$5,680 to \$6,208 per participant.¹⁹⁰ This result is similar to the cost savings found in studies in California and Washington State.

Similarly, a comparison of 209 defendants who participated in Seattle's Community Court with 239 who did not, found that after 18 months participants spent notably fewer days in jail and had fewer court appearances. The three year savings in public defender time and jail costs were projected to be more than \$500,000 after taking into account the cost of staffing the Community Court. Another case study tracked 6,500 participants in Portland, Oregon's drug court from 1991 to 2001 and found a saving of \$12,218 per participant compared to traditional courts. The savings were primarily due to reduced recidivism in jail, defence and victim expense, less the extra cost of court operations, drug treatment and professional staffing.

NPC Research performed cost studies in 30 drug courts across the USA between 2000 and 2006, and produced a comparative study of 18 of these. Researchers employed an approach called Transactional and Institutional Cost Analysis (TICA) which views an individual's interaction with publicly funded agencies as a set of transactions in which the individual utilises resources contributed from multiple agencies. The TICA approach recognises that these transactions take place within multiple organisations and institutions that work together to create the program of interest. These organisations and institutions contribute to the cost of each transaction that occurs for program participants. TICA is an intuitively appropriate

¹⁸⁹ *Op cit*, p43.

¹⁹⁰ Roberts, K (2012), *ibid*, p1.

approach to conducting costs assessment in an environment such as a drug court, which involves complex interactions among multiple taxpayer-funded organisations. In order to maximise the study's benefit to policymakers, a 'cost-to-taxpayer' approach was used in the evaluations.¹⁹¹

The 2000 evaluation of the DC drug intervention programs estimated the value of benefits in the form of averted costs of victimization, arrest, prosecution and incarceration. The significant reductions in arrests among program participants resulted in a total net benefit of \$713,570, savings of about \$2 for every \$1 in program costs. The Honolulu Drug Court estimated it saved between \$677,000 and \$854,000 per year in averted prison costs for offenders who would have been incarcerated if not successfully treated. The Multnomah County Drug Court in Oregon saved nearly \$2.5 million per year in criminal justice costs. When savings in victimisation, theft reduction, public assistance and medical costs were added, the payoff rose to a little more than \$10 million per year. The National Institute of Justice concludes that 'criminal justice intervention is a good investment of public funds'.¹⁹²

The UCSB evaluation of the Santa Barbara County Substance Abuse Treatment Courts (SATC) between 2001 and 2011 estimated that over 85,000 jail days and 184,000 prison days were saved as a function of participation in the SATC program.¹⁹³

Victimisation costs savings (lost wages, medical and mental health care etc.) resulting from reduced recidivism for 300 participants in the Nebraska Drug Court as at March 2004 was \$1,120,886 for violent crime reduction and \$64,823 for property crime reduction, or total victimisation cost savings of \$1,174,809.¹⁹⁴

A 2004 study of the Kalamazoo County Drug Courts found that \$12,106 had been paid to victims by program participants.¹⁹⁵ Payments made by the first 1,858 graduates of the New Jersey Adult Drug Courts total \$3.86 million, with an average per participant payment of approximately \$2,078.¹⁹⁶ 1,666 graduates across the 19

¹⁹¹ NPC Research (Carey, S et al) (2008), *ibid*, p2.

¹⁹² Harrell et al (2000), *ibid*.

¹⁹³ Cosden, M, Sullivan, K, Larsen, J, Donahue, M and Thomat, A (2011), 'Evaluation of Santa Barbara County Substance Abuse Treatment Courts 2001-2011', University of California Santa Barbara, pp9 & 12.

¹⁹⁴ BJA Clearinghouse (2011), Part Three, *ibid*, p20.

¹⁹⁵ *Op cit*, p2.

¹⁹⁶ *Op cit*, p43.

Oklahoma Drug Courts had decreased their unemployment rate by 75% and increased their monthly income by over 50%. During the course of treatment, over 13% had achieved a high school diploma; 19% had their children living back with them; and substantial improvements were recorded over every component of the Addiction Severity Index (Medical 56%; Employment/Support 70%; Alcohol 65%; Drug Use 65%; Legal 73%; Family/Social 69%; Psychiatric 85%).¹⁹⁷

A 2004 Cost Analysis of the Maryland Drug Court concluded that the Drug Treatment Court cost \$2,571,894 less than the comparison group, representing a 32.4% return on investment. Average cost per participant was \$2,109; average criminal justice system savings, including victimisation costs, and income tax payment was \$3,651, which represents savings of \$1.74 for every dollar spent on the program.¹⁹⁸

A 2003 Cost Analysis of Baltimore City, Maryland, Drug Treatment Court (BCDTC) found that 12 months after their entry into the program, members of the BCDTC sample had cost over \$3,000 less in 'business as usual' criminal justice system costs as compared to the comparison sample. Over the course of the three year study period this amount increased to \$3,393 or 24.2% less than the comparison sample. The total savings found for the participants during the study period was \$2,721,894.¹⁹⁹ Utilizing a victimisation cost index produced by the National Institute of Justice, the researchers found the BCDTC sample was responsible for an average of \$9,818 less in victimisation costs than was the comparison sample, or a total cost saving of \$7,442,044 during the study period.

The researchers also produced estimates regarding increased State and local income tax revenue and other local public service costs savings resulting from the BCDTC participants. It was estimated that BCDTC participants from the study period were responsible for \$125,426 in increased State and local income tax revenue and \$677,695 in other local public service savings. A cost-benefit calculation found a total of \$10,817,059 in financial benefits associated with the average of 758 BCDTC participants during the study period. As compared to the program cost for this group, this represents a three year 136.2% 'return' on the

¹⁹⁷ *Loc cit.*

¹⁹⁸ American University (Washington DC) (2012), 'Recidivism and Other Findings Reported in Selected Evaluation Reports of Adult Drug Court Programs Published 2000-February 2012', compiled by the BJA Drug Court Clearinghouse Project. School of Public Affairs. www.american.edu/justice, accessed 4/8/12, p1.

¹⁹⁹ Crumpton, D et al (2003), *ibid*, p8-9.

amount 'invested' in the BCDTC program. When the cost of the program is subtracted from the gross benefit, the study found a net benefit of \$2,873,306 of 36.2% return on the amount invested in the program. They estimated that this 'investment' would be recouped in approximately four years after the exit of participants from the program.²⁰⁰

Evaluation of a Minneapolis Drug Court also found a 'readily apparent' increase in judicial efficiency and noted the increase in case processing speed achieved by the Drug Court, reflecting a further cost saving.²⁰¹

These studies suggest that problem-solving courts save on court appearances, imprisonments, thefts, and the child support and welfare expenses that follow parental imprisonment. A broader view of cost savings can provide a level of persuasive economic rationale that supports many of the court system's competitors for public funds. For example, a 2009 study of an integrated treatment program in Seattle found that the program saved taxpayers more than \$2 million per year for the 95 chronic addicts in the study, taking into account days incarcerated, shelter and sobering centre use, hospital-based medical services, publicly funded alcohol and drug detoxification and treatment, emergency medical services and publicly funded medical services.²⁰² Roberts suggests that 'unless court systems start generating data that support not only the human need for their operations, but also the financial rationale for them, budgetary woes are likely to continue'. The National Institute of Justice concludes that 'criminal justice intervention is a good investment of public funds'.²⁰³

A comprehensive 2009 evaluation of mental health diversion schemes in the United Kingdom (UK)²⁰⁴ from a value for money perspective found that well-designed arrangements for diversion have the potential to yield multiple benefits, including:

- Cost and efficiency savings within the criminal justice system;

²⁰⁰ *Op cit*, p9.

²⁰¹ BJA Clearinghouse, Part Three, *ibid*, p7.

²⁰² *Op cit*, p39.

²⁰³ Harrell, A, Cavanagh, S and Roman, J (2000), 'Evaluation of the DC Superior Court Drug Intervention Programs', National Institute of Justice, Research in Brief, US Department of Justice. www.ojp.usdoj.gov/nij, accessed July 2012.

²⁰⁴ Parsonage, M (2009), 'Diversion: A better way for criminal justice and mental health', Sainsbury Centre for Mental Health, London. www.scmh.org.uk, p5, accessed 25/6/11.

- Reductions in re-offending; and
- Improvements in mental health.

Collectively, these benefits constitute a powerful argument for diversion on value for money grounds. Conservative estimates put this at over £20,000 per case, including savings to the criminal justice system of up to £8,000 and benefits from reduced re-offending valued at around £16,000. Such benefits could equally be applied to other forms of problem-solving courts, particularly in the context of the financial impact of drug related offending on society.

Judge Justin Phillips, the inaugural judge in the West London Dedicated Drugs Court, states that 'a really entrenched addict needs at least £100 a day. To get that he needs to fence goods valued at between £400 and £500. On average, an addict commits 127 crimes a year, and the cost to the economy of drug abuse is now running at £15 billion a year.'²⁰⁵ A simple cost comparison between prison cost per year (£37,000) and drug court participation for six to nine months (£2,000) reveals a crude but considerable cost saving, compounded by the estimated 30% to 40% likelihood that drug court participants never reoffend.²⁰⁶

In England, the costs imposed on society by persistent, high-rate offending and drug-related mortality and morbidity are such that 'even modest improvements might be cost-beneficial overall'.²⁰⁷ Break-even analysis of the Dedicated Drug Courts pilot in 2008 showed that (compared to normal adjudication) an extra 8% of offenders seen by the courts would need to stop taking drugs for five years or more following completion of the sentence to provide a net economic benefit to the wider society, and 14% (a further 6%) doing so would provide a net economic benefit to the criminal justice system.²⁰⁸ A process evaluation of the pilot in 2011 found that the costs of setting up and running the courts were small and included, for example, the provision of some additional training. In some cases the courts were seen as a way of reducing costs through gains in efficiency, for example drug-misusing offenders

²⁰⁵ Arnot, C (2009), 'A touch of familiarity', The Guardian, 22/4/09, www.guardian.co.uk, accessed 4/1/12.

²⁰⁶ Hargreaves, G (2007), *ibid*.

²⁰⁷ Matrix Knowledge Group, UK Ministry of Justice, 2008, 'Dedicated drug court pilots: a process report', www.justice.gov.uk/publications/research010408.htm, p2, accessed 12/1/12.

²⁰⁸ *Op cit*, p1.

were seen on the same day and therefore treatment provider presence was only required at the one set court.²⁰⁹

The Australian situation

A total of **\$11.6 billion** was spent on the criminal justice system in Australia in 2009, including \$1.5b spent on the criminal justice courts and \$8.1b spent on state, territory and federal police services.²¹⁰ The number of drug arrests increased by 7% to 83,873 in 2008-09.²¹¹ 66% of these arrests involved cannabis.²¹² An average of 45% of male offenders arrested by police (detainees) across nine sites throughout Australian tested positive to cannabis,²¹³ and an average of 62% tested positive to some form of illicit drug.²¹⁴ 56% of adult male detainees charged with a violent offence tested positive to some form of drug, compared with 68% of those charged with property offences.²¹⁵

Total Australian government expenditure on corrective services in 2008-09 was approximately \$3.2 billion.²¹⁶ At June 30 2010 there were 29,700 prisoners in Australian prisons, 11% of whom were imprisoned for illicit drug offences. Of prisoners aged 25-34 years, this percentage increased to 32%.²¹⁷ 17% of sentenced female prisoners were imprisoned for illicit drug offences.²¹⁸ Over one third of prisoners serving sentences for illicit drug offences had been imprisoned before.²¹⁹ Victorian data indicates that about 66% of new prisoners reported that their offences were related to drug use, and that this figure increases with second or subsequent sentences, with approximately 80% of men and 90% of women reporting problems with drug use.²²⁰

²⁰⁹ Kerr, J et al (2011), 'The Dedicated Drug Courts Pilot Evaluation Process Study', Ministry of Justice Research Series 1/11. London: Ministry of Justice.

²¹⁰ Australian Institute of Criminology, *Australian crime: Facts & figures 2010*, www.aic.gov.au, accessed 25/6/11, p iv.

²¹¹ *Op cit*, p37.

²¹² Consumers accounted for 82% of drug-related arrests, with providers accounting for 18%. *Op cit*, p38.

²¹³ *Op cit*, p69.

²¹⁴ *Op cit*, p73.

²¹⁵ *Op cit*, p75.

²¹⁶ *Op cit*, p130.

²¹⁷ Australian Bureau of Statistics, *Prisoners in Australia 2010*, www.abs.gov.au, accessed 25/6/11, p10.

²¹⁸ *Op cit*, p12.

²¹⁹ *Op cit*, p15.

²²⁰ Victorian Prison Drug Strategy 2002, cited in Department of Justice 'Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches', March 2006, *ibid*, p2.

Australian cost-benefit analyses have indicated that drug court programs are at least as cost-effective, and in some cases are more cost-effective, than the alternative of imprisonment.²²¹ A re-evaluation of the NSW Drug Court program found the program was a cost-effective use of resources leading to a significant reduction of, and delay in, recidivism, and offered a considerable saving because of reduced incarceration. A Western Australian evaluation established that the Drug Court was more cost-effective than other sentencing options when the different rates of recidivism were taken into account. A Victorian evaluation found that, although the program was slightly more costly than imprisonment, the cost savings in terms of decreased offending were significant.²²²

The Tasmanian situation

Tasmanian data indicates a relatively high and increasing rate of property crime associated with illicit drug use. Drug users in this state are twenty times more likely to be arrested for property crime than for drug crime.²²³ The Australian Crime Commission recently released figures that show illicit drug arrests in Tasmania rose by 5.4% in 2009-10, compared to the national average of 1.6%.²²⁴ A 2001 study by the Australian Institute of Criminology of 150 Tasmanian prison inmates indicated that almost 80% had used at least one illicit drug, and over 35% thought they were addicted immediately prior to their incarceration.²²⁵ Furthermore, 2006 research indicates that 40% of people in Tasmania's prisons associate their offending with alcohol or illicit drug use.²²⁶ The Australian Lawyers Alliance estimates that '70 to 80% of offences before Tasmanian courts have drugs at their base'.²²⁷

Police indicate that a small number of 'high-end' drug users can be responsible for an enormous amount of property crime committed in order to support their drug habit. Training material for the Community Corrections 'Getting Smart' Drug and Alcohol program suggests that seriously addicted drug users can spend up to 80% of

²²¹ Payne, J (2006), 'Specialty courts: current issues and future prospects', *Trends & Issues in Crime and Criminal Justice*, No 317. Canberra: Australian Institute of Criminology, p2.

²²² King et al (2009), *ibid*, p148.

²²³ Stojcevski, cited in Success Works (2008) Tasmania's Court Mandated Drug Diversion Program Evaluation Report, *ibid*, accessed June 2011.

²²⁴ *Hobart Mercury* 25/10/11, p17.

²²⁵ Second Reading Speech, Sentencing Amendment Bill (2007), Parliament of Tasmania, p1.

²²⁶ Success Works (2008), *ibid*, p19.

²²⁷ *Hobart Mercury* 24/10/11, pp4-5.

their time accessing, using and recovering from the effects of illegal drugs.²²⁸ This includes time spent committing crime to pay for drug use, and evidence suggests that such offenders can easily commit dozens of property crimes in one night in order to fund their addiction.

This is referred to as 'binge stealing' by one successful participant in the Tasmanian CMD program.²²⁹ Another former program participant told me during his interview that he would regularly break in to 20 to 30 houses a night to secure the means to fund his drug habit. A current program participant informed me that it was a 'business as usual' event for him to use \$100 worth of amphetamines before proceeding to rob numerous businesses in order to fund a further \$1000 worth of drug use on the same occasion. Another participant reported that he had been part of a drug distribution network responsible for importing drugs with a street value of millions of dollars into the local community over dozens of interstate trips. The true cost of offending in such a scenario is extraordinarily extensive and should be a convincing argument that there is merit in an approach which seeks to address the causes rather than the symptoms of crime in the community.

These figures demonstrate the urgent need to take action to address the intersection of illicit drug use with the criminal justice system, if only from the perspective of economic rationalism. Given the prevalence of the problem and the demonstrated inability of our traditional responses to be effective in reducing it, it seems timely, rational and worthwhile to invest in alternative approaches such as therapeutic jurisprudence which have the potential to bring about long-term change in the lives of offenders, thus having a direct and significant impact on the cost and effectiveness of criminal justice in this country. This extends to savings in health, police, courts, prisons and Legal Aid budgets in addition to reducing the many costs of crime to victims, as well as reducing less direct costs resulting from criminality and drug use such as poverty, disease and accidents.

It seems warranted to mention at this point the decisions by the recently elected conservative governments in New South Wales and Queensland to discontinue funding to drug and other specialist courts. This is despite the annual report of the

²²⁸ 'Getting Smart' training course run for Community Corrections, Department of Justice (Tasmania), 29-30 August 2011.

²²⁹ Hobart Mercury, 24/10/11, *ibid*.

Magistrates Court of Queensland 2010-11 indicating that the Drug Court saved 588 years of prison time in 2010-11 by diverting people from prison. Queensland Law Society president John de Groot pointed out the savings of the Drug Court alone to taxpayers. 'In dollar terms, based on a conservative estimate of the cost of imprisonment of \$200 per day per person, the money saved for taxpayers and the government by the Drug Court is in excess of \$41 million', Dr de Groot said.²³⁰

Judge Irwin from Queensland notes that 'there is no room for rational debate. The decisions have been made for policy reasons directed to reducing spending in the short term . . . they are part of an overall slash and burn philosophy. Because of the other cuts to the budget in many areas diversionary programs have been lost in the process. It is not helped by having a News Limited media which is more interested in sensationalism (subject to a few journalists) and soft sentencing than any rational discussion of policy. As a result it is difficult to get the story out to the public in any meaningful way'.²³¹



The court complex in Cardiff, Wales.

²³⁰ <http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html#ixzz26m5elf23>, accessed 22/9/12.

²³¹ Judge Irwin, Queensland, tjsp@topica.com, 18/9/12. See the discussion with members of the TJ community in Australia and overseas in response to this decision at tjsp@topica.com, between 13/9/12 and 19/9/12. Numerous high profile proponents of TJ from around the world express their dismay at the Queensland decision, describing it variously as 'short-sighted', 'ill-founded', 'sad, stupid and heartless', part of a 'slash and burn philosophy', 'mindless punitivity', 'a sad affront to justice and a false economy' and 'wrong-headed and hard-hearted'. See also 'Court closures a savage blow to justice and respect for the law', The Courier Mail, 25/9/12.

Part C: Research findings

Chapter 7 – TJ747 – The Key Components at work around the world

This chapter reflects on learning from my experiences visiting drug courts and associated programs around the world between February and May 2012. The ‘dot points’ under each of the Key Components represent my personal observations and conclusions based on these experiences.

Cross jurisdictional analysis – introduction and methodology

I have worked in Corrective Services in Tasmania, in the prison system, Community Corrections (Probation and Parole) and currently the Tasmanian drug treatment court, for over twenty years. I have made personal and professional connections with colleagues in this industry around the world, some of whom were instrumental in enabling aspects of this research to proceed. I established further contacts through an international ‘therapeutic jurisprudence’ web forum to which I subscribe. In some cases, particular courts or judges were recommended to me by others I visited and interviewed or by specialists in the field. I have visited the Parramatta Drug Court in New South Wales and the Dandenong Drug Court in Victoria, and I have experience of the CMD court presided over by each of the four southern Tasmanian CMD magistrates and one relieving magistrate.

Between February and May 2012 I visited nine drug courts and met with teams and judges and attended sessions of both drug courts and mainstream courts. The drug courts were in Santiago (Chile); Santa Maria (Santa Barbara County in California); Los Angeles; Queens, (New York); Washington DC; London (UK); Cardiff (Wales); Paris (France); and Vienna (Austria). I also visited mainstream courts in Los Angeles and Chicago, client (treatment) services in LA and Amersfoort (The Netherlands) and an innovative custodial drug treatment program in Baltimore. I interviewed additional corrections professionals in Bridgend, Wales and evaluators and researchers working in this field in California, Utrecht (The Netherlands) and Ghent (Belgium).

The following information comprises some of my observations and conclusions drawn from these experiences, expressed through the framework of the Key Components. Drug court compliance with these Key Components is closely linked to successful outcomes, so it seems a practical approach to discuss what I learnt with reference to this structure. Although I visited a range of programs across jurisdictions and from different legal traditions, a number of common themes emerged, and some of these are summarised below.

10 Key Components for Drug Courts²³²

The Key Components are guiding principles for operating an effective drug court developed for state courts in the USA by the Drug Court Standards Committee of the US National Association of Drug Court Professionals, partnered with the US Department of Justice's Office of Justice Programs in 1997. Government funding in the US often requires compliance with these key principles.²³³

Judge Peggy Hora (retired) concluded in 2011 that the Key Components, first created in 1997, 'stand the test of time for about fifteen years in an era of tremendous growth of problem-solving courts with only a few necessary additions'.²³⁴ The United Nations added two new components in its 1999 report outlining principles for court-directed treatment and rehabilitation programs. The first states that 'ongoing case management should include the social support necessary to achieve social reintegration' and the second addresses cultural competence, indicating that programs should employ flexibility to address the needs of women, indigenous people and minority ethnic groups.²³⁵

Key Component #1: Drug courts integrate alcohol and other drug treatment services with justice system case processing.

- People and the relationships between them are more important to the success of drug courts than the processes and structures which support them. When members of drug court teams are like-minded as regards their values and

²³² US Department of Justice, Drug Courts Program Office, Jan 1997.

<http://www.ndci.org/sites/default/files/ndci/KeyComponents.pdf>

²³³ National Association of Criminal Defense Lawyers (2009), *ibid*, p60.

²³⁴ Hon Peggy Fulton Hora (Ret) (2011), *ibid*, pp10, 33 & 50.

²³⁵ *Op cit*, p50.

understanding of the purposes of the program, structural obstacles can be overcome by the goodwill generated between team members. This is evident in the way in which some drug courts, such as the one in Ghent, Belgium, have been established through personal relationships between judges and prosecutors who shared a sense of frustration about the 'revolving door' criminal justice system and the bureaucratic process which delayed offenders' access to treatment, and who were prepared to work together to bring about change. Drug courts can have quite varying structures and processes (eg pre-trial, pre-sentence, post-sentence, re-entry (post incarceration), or for first time offenders only) but can nevertheless be effective – no one model is necessarily predominant. Cultural context is critical, and each court must be able to meet the needs of its own population and stakeholders.

- Notwithstanding this, it is important that drug courts do not remain reliant on the direction and intervention of charismatic leaders and founders to exist, but that processes and procedures are institutionalised and systematised in order to ensure the longevity of the program.²³⁶ Using Weberian analysis in reflecting on the drug courts I have experienced worldwide, it becomes clear that a shift in court structures will accompany a shift towards the institutionalisation and systematisation of drug courts that is needed if their success is not to remain reliant on the intervention of individual charismatic judges.
- The importance of succession planning is all the greater because the relationships between team members are so fundamental to the ongoing success of the program. This will be an important development in drug courts becoming embedded within criminal justice systems, particularly in the USA where the election of judges can represent a significant barrier to extending the implementation of therapeutic jurisprudence in the context of such a

²³⁶ In Weberian typology, leadership of drug courts needs to move from the substantive irrational typology (characterised by less autonomy of the legal system and less use of general legal rules to decide cases) towards a more formal rational typology (with more autonomy of the legal system and more use of general legal rules to decide cases). The rule of law is a central component in the 'legal authority' that Weber saw as being the characteristic form of authority in modern Western societies. Weber's Typology of Modes of Legal Decision Making is a comparative strategy which encompasses the range of diverse legal procedures found in various human societies. Inverarity, J, Lauderdale, P, and Feld, B (1983), *Law and Society: Sociological Perspectives on Criminal Law*. Boston & Toronto: Little, Brown & Co, p105.

strong 'law and order' discourse. Judge Hora recently noted an emerging trend in the USA for judges to attempt to 'out TJ' each other in campaigning for election, and it is to be hoped this will become a widespread approach.²³⁷

- A multi-disciplinary approach strengthens teams, and teamwork is crucial to success. Shared values and good rapport between team members make for better results. Multi-disciplinary teams are working to excellent effect in Santa Barbara, Los Angeles and in South Wales.
- Genuinely collaborative teamwork, rather than 'top-down' leadership, leads to better courtroom outcomes. This was exemplified in the Santa Barbara and Los Angeles courts.
- The triaging of cases listed for court such that those in which a positive response is expected are presented first, and those resulting in negative feedback or the imposition of sanctions are presented last, has benefits for all the participants and their family members present in court. This process enhances the therapeutic culture and is also beneficial for members of the drug court team. This practice was applied to positive effect in the Los Angeles courtroom.

Key Component #2: Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

- The drug courts in Santa Maria and Los Angeles demonstrated extremely effective teamwork, both in court and in the pre-court 'staffing' sessions, with long-serving team members who worked smoothly together in a style I would term relaxed professionalism. The expertise of each team member was evident and their operation together brought to mind the image of a well-oiled machine. To some extent this was a factor of more mature courts with dedicated staff including the judge, the prosecutor, the public lawyer and the case manager. It also demonstrated the importance of the relationships between the individual team members, their shared values and understanding of the program and their willingness to adopt a holistic therapeutic approach rather than more limited, traditional roles within the adversarial system.

²³⁷ Comments made at the Australian National Drug Court Conference, Melbourne, November 2010.

- The pre-court conference, or 'staffing' meeting of judge, prosecutor, lawyer, probation officer, diversion officer or equivalent is instrumental in the development of a non-adversarial or therapeutic culture. This forum allows conflicts and issues to be resolved before the court appearance, so that the participant in court experiences a unified response from the drug court team.²³⁸ This mechanism limits adversarial practices such as calling for hearings in relation to facts or disputes over sanctions. The 'staffing' is key to creating a genuinely problem-solving approach, and when run effectively it can achieve significant efficiencies (including in the provision of written reports) and can have substantial benefits for all concerned.
- Good levels of communication and respect between the various professionals, clear role definition and boundaries assist programs to work well, clearly demonstrated by the Ghent program in Belgium. As Tasmanian Chief Magistrate, Michael Hill, writes, (in Tasmania) 'the legislative provisions have inserted a non-adversarial approach in an adversarial structure. Roles can become blurred if all the team players are not singing from the same sheet with a focus on seeing if the participant can make it through the program'.²³⁹
- I found the mainstream US court system generally to be a depressing reminder of why drug courts are so badly needed and just how revolutionary they are in that judicial context. This was Geoffrey Robertson's 'Justice Game'²⁴⁰ being played at its worst. Nevertheless, some progressive programs are being implemented even in the most impoverished of environments, through the energy and will of motivated individuals who are having a substantial impact at the micro level.

Key Component #3: Eligible participants are identified early and promptly placed in the drug court program.

- The assessment process needs to be sufficiently rigorous to identify the best candidates for drug treatment courts. The evidence suggests that intensive

²³⁸ One prosecutor compared this process to two disputing parents resolving their differences without the children being present, and subsequently presenting a 'united front' to the children. I found this analogy instructive and useful.

²³⁹ Michael Hill (2012), 'Wandering Down the Therapeutic Jurisprudence Road', *Australian Law Librarian*, Vol 20, No 2, p71.

²⁴⁰ Robertson, Geoffrey (1999), *The Justice Game*. London: Vintage.

therapy should be targeted at high-risk offenders and that the practice of 'skimming', or allowing low-risk defendants who are likely to be successful into programs, should be avoided. Assessment in post-plea jurisdictions needs to be able to filter candidates who are genuinely committed to addiction treatment from those who are simply aiming to avoid an immediate custodial sentence.

- Consent to participate seems to be associated with motivation to succeed, which is intrinsically linked to success. This feature was notably absent in the Cardiff courtroom, where a Drug Rehabilitation Requirement can be imposed without consent.

Key Component #4: Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

- Resourcing must be adequate for a program to pay dividends in terms of substantial cost savings and good success rates. As a university-based program evaluator in California contends: 'Why would we expect it to be cheap to fix this problem?' If programs are not properly resourced they cannot be effective (residential care is a case in point in Tasmania). This was evident in LA where all program participants (over 1000 to date) start the process with 90 days residential rehabilitation. The opposite was apparent in Paris, where ongoing budget crises have dramatically reduced the capacity for effective service provision.
- Drug court success is linked to the availability of adequate and appropriate programs for offenders. It is advantageous to jurisdictions to have a range of program options to refer clients to. This was the case in Santiago, LA, New York (with over 100 programs), Washington DC, Baltimore (with 64 community based substance abuse treatment programs), South Wales (with over 150 community services) and Ghent, Belgium.
- Where a range of community based programs is available to refer to, there is greater capacity to identify suitable programs to match the needs of participants, such as programs conducted in remote areas and on weekends or evenings.

- Practical measures such as subsidising participant travel to programs and providing a diary to keep track of appointments are helpful in encouraging attendance, and were reportedly associated with improved levels of attendance.

Key Component #5: Abstinence is monitored by frequent alcohol and other drug testing.

- Testing for cannabis use is expensive and a number of jurisdictions have dispensed with it (including Santiago, New York and Cardiff). The Santiago court focusses on reducing offending rather than reducing drug use, so no drug testing is undertaken. The New York program expects drug use to occur, and in Cardiff cannabis use is regarded as so prevalent it would be both pointless and a waste of money to test for it.

Key Component #6: A coordinated strategy governs drug court responses to participants' compliance.

- Sanctions, both positive and negative, need to be clear, predictable and enforced consistently. As Tasmanian Chief Magistrate Michael Hill points out, 'there is much support in the literature to show that if participants are not sanctioned at an early time after breaches have been established, the incentive to comply is lessened.'²⁴¹
- Innovative sanctions are used to positive effect in drug courts across the USA. These include participants being required to write a personal biography or an essay explaining their behaviour to the court, and a 'day in the box' sanction in which participants are required to spend up to three days in the jury box of the drug court, later critiquing proceedings and discussing their observations with the judge. This has proved to be a useful learning exercise for participants, with the judge commenting that 'sometimes it's easier to see yourself in others than in the mirror'.
- Some lay magistrates in the UK seemed overzealous in sanctioning minor transgressions such as failure to attend appointments or failure to have prescriptions filled. It would seem that a balanced approach, rather than a

²⁴¹ Hill (2012), *ibid*, p71.

technical one, is more appropriate in these circumstances. I suspect that a wise judicial manner is achieved through years of experience and legal training, and these are not requirements for lay magistrates in the UK.

- I was struck by the degree to which participants across the range of programs I have witnessed are keen to impress the presiding judicial officer. This extends to accepting negative sanctions, including impositions of actual imprisonment, with good grace, regret and determination to improve in the future. The relationship that develops between the judicial officer and the offender clearly functions as a positive incentive. The process of graduation between phases and from the program is significant for maintaining participant motivation.

Key Component #7: Ongoing judicial interaction with each drug court participant is essential.

- I saw some excellent and varied examples of this component in practice during my travels. Older, more experienced judges were generally more comfortable in their role and undertook it with competence, humour and an individual approach tailored to participants. Some judges were more focussed on efficiency while others were very thorough and spent longer with each participant. This factor was notably absent in Austria, where the participant only returns to see the judge in the case of a breach. This is a much less rewarding system for the judge as well as lacking an important element of therapeutic jurisprudence for the participant.
- Chief Justice Paul de Jersey, of the Queensland Supreme Court, visited the West London Drug Court during the tenure of the innovative and somewhat controversial Judge Justin Phillips. De Jersey describes Judge Phillips' approach as 'extroverted though empathic' and 'very much hands on'. He felt Judge Phillips engaged very effectively with offenders and produced 'a sense of trust which could potentially have greatly assisted rehabilitation'. Chief Justice de Jersey believes that approaches to drug crime where there is no

victim, at least in an immediate sense, other than the offender, need to be creative.²⁴²

- Continuity and consistency are enhanced by the same judge having ongoing oversight of each case. The panels of lay magistrates which operate throughout the UK do not embody this feature as their makeup can be different on each occasion they sit.
- Positive feedback and expressions of gratitude are common in drug courts, including comments such as 'this court saved my life'.
- Hora notes that prior to the problem-solving court movement, a notion of emotional intelligence in the judiciary would have been unthinkable, but 'now we have federal judicial nominees chosen for their 'empathy' and 'heart'. Judges are now leaders of a treatment team with transformational leadership, motivational interviewing and stages of change literature'.²⁴³
- In my view, drug court judges should be appointed, (not elected as in the USA), and highly qualified, trained and experienced (not well-meaning volunteers as in the UK). TJ judges are often involved in a range of specialty courts – mental health, women's re-entry, veterans, drug diversion, drug treatment and DUI, and clients of these courts often overlap. Judges can play the role of therapist, mentor, supervisor, school principal, parent, probation officer and service broker.
- Judicial officers have greater opportunity and capacity to develop and refine their roles when they function as dedicated judges within a problem-solving court, rather than shifting between adversarial and therapeutic courtrooms.

Key Component #8: Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

- Evaluation of drug courts needs to be taken seriously and conducted to the highest standards. The best examples of this I saw were in drug courts which are closely associated with local universities that conduct ongoing evaluation. This is notably the case in Santa Maria, Washington DC and Ghent,²⁴⁴

²⁴² Personal correspondence from The Hon Paul de Jersey, Chief Justice of the Supreme Court of Queensland, 17/8/12, on file with author.

²⁴³ Hora (2011), *ibid*, pp34 & 52.

²⁴⁴ Ghent University boasts 25 full time staff in the Institute of International Research on Criminal Policy!

although many American drug courts have also been extensively evaluated. Evaluation needs to comprise both qualitative and quantitative measures and, ideally, process evaluation as well.

- The simple measure of photographing participants before and after program participation can illustrate progress pursuant to a drug court program. This can be a concrete way for participants to witness their own improvement.
- Drug court programs are often catalysts for other constructive change in many domains of participants' lives (see Chapter 8).
- Success rates as defined by graduations from drug court programs ranged from 40% to 75% across the various programs I visited.
- Drug courts generally lead to reductions in costs in addition to reduction of custodial days served. Some programs in the USA have been implemented in direct response to legislation to reduce the prison population. Savings also occur across a range of public services including public health, police and other emergency services, legal services, courts, public housing, child protection services, education and others. (See Chapter 6).
- Reductions in drug-related crime lead to benefits for victims, insurance companies, the criminal justice system and the wider community.
- Drug courts need to collect rigorous evidence demonstrating their effectiveness and cost-savings in order to secure continued funding. The recent cuts to drug courts and other specialist courts in NSW and Queensland suggest the vulnerability of such programs to political decision-making by conservative governments in tight economic climates.
- Caution should be exercised with respect to privatisation, payment by results, accountability measures and over-bureaucratism at the expense of good casework, all of which can have a damaging effect on staff and client morale. This was particularly evident to me in the UK and France, where such policies have been incrementally implemented over recent years, pursuant to a conscious political shift towards a managerialist approach to corrective services.

Key Component #9: Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.

- The importance of professional development and networking with peers to share information and learn from each other cannot be overstated in what is a relatively new and rapidly changing field. Many practitioners and professionals associated with drug courts are adapting processes and procedures to suit their own jurisdictions. Much of the literature about this field is recent and is shared through less formal but more immediate mechanisms than traditional academic writing, such as web networks and forums, conferences and online publication of papers without the requirement of lengthy and rigorous editorial and peer review (eg on the Social Sciences Research Network).²⁴⁵
- Hora writes that interdisciplinary education allows all members of the team to participate in a common forum and receive the education necessary to pursue effective participant recovery. Attorneys, judges, community corrections personnel, court managers and treatment providers should have the opportunity to learn from one another's experience. Commonality of experience fosters trust among the members and strengthens the entire team.²⁴⁶
- Tasmanian Chief Magistrate Michael Hill notes the need to 'continue professional development in each of the areas, namely judicial, treatment provision, diversion, administration and prosecutorial and defence roles'.²⁴⁷
- My impression is that a culture of continuous improvement is typically a hallmark of more well developed and well-resourced programs. Well trained staff are regarded as a safeguard for quality work, and such programs are evidence-based and informed by expert knowledge (for example, having a high degree of compliance with the 10 Key Components). This seems to

²⁴⁵ For a discussion of this evolution, see David Wexler (2012), 'An Unshackled Law Review and Its Ground-Breaking Annual Issue on Therapeutic Jurisprudence and Comprehensive Law', *Phoenix Law Review*, Vol 5, No. 4. Phoenix, Arizona: Phoenix School of Law, pp671-3. <http://www.law.arizona.edu/depts/uprintj/pdf/plr54.pdf>, accessed August 2012.

²⁴⁶ Hora, P (2008), 'Drug Treatment Courts in the 21st Century: The Evolution of the Revolution in Problem-Solving Courts', in the *Georgia Law Review*, Spring 2008, 42 Ga. L. Rev. 717.

²⁴⁷ Hill, *ibid*, p73.

have the effect of quarantining programs to some extent from the influence of political opportunism, negative media criticism and ill-informed public opinion.

- Collaboration between researchers and practitioners informs both research and practice. Close relationships with local universities can benefit programs in terms of further education, research, evaluation, grants applications, and placements for post-graduate students. These relationships worked well in Santa Maria, Washington DC and Ghent, Belgium.
- Drug courts in Australia have the advantage over their European counterparts of being less constrained by history, culture and an entirely written legislative code. The common law has the capacity to allow for more flexibility in the interpretation of legislation.
- Many problems and issues are common across agencies and countries. These include compliance, transport, peer group influence, excuses, co-morbidity, assessment, accommodation, motivation and the treatment versus justice debate.

Key Component #10: Forging partnerships among drug courts, public agencies and community-based organizations generates local support and enhances drug court effectiveness.

- Such partnerships help to 'scaffold' drug court treatment programs which might be threatened by funding limitations or media negativity.
- Services need to be available for users of drugs and alcohol, and partnerships with these agencies can provide material support to programs. For example, Wal-Mart in the USA donates toys to drug courts for judges to give to the children of program participants as rewards for participant compliance.
- There will always be the need for public education and advocacy for individuals and therefore benefits to be gained from positive alliances with local media.

Hora states that as treatment courts 'go to scale' and serve every individual who needs court-supervised treatment in the justice system, these principles will continue to be employed and may need adjustments from time to time. ²⁴⁸

²⁴⁸ Hora (2011), *ibid*, p52.

Chapter 8 - What does success in Tasmania look like?

Success in drug courts is typically measured by graduation between phases of the program and ultimately from the program, and changes in rates of reoffending (recidivism) and drug use. Other factors measured in some evaluations include cost factors and increases in participant retention rates, participant satisfaction and community confidence.²⁴⁹

Another measure of success in drug courts is the global functioning of the individual – reflected in factors such as employment, health, spending time with family, involvement in study, stable accommodation, management of debts and fines and other factors which suggest a non-using and non-offending lifestyle.²⁵⁰ These factors can be assessed formally with actuarial assessment tools such as the Level of Service / Case Management Inventory (LS/CMI) or the Addictions Severity Index (ASI), as well as informally through observed change. The LS/CMI provides a numerical score for each of the factors known to be most closely associated with criminogenic behaviour (Criminal History, Education / Employment, Family / Marital, Leisure / Recreation, Companions, Alcohol / Drug Problem, Pro-Criminal Attitude / Orientation and Anti-Social Pattern). Measurement before and after completion of a drug court program can assist to evaluate change made during the course of the program.

The ASI examines seven areas of functioning over a lifetime and the past 30 days (Education; Employment; Medical; Psychological / Psychiatric Status; Family and Social Functioning; Drug and Alcohol Use; and Legal Problems). It is important to measure the aspects the treatment is trying to change, so treatment interventions must be clearly identified and linked to specific needs and goals. For example, evaluation of the Santa Barbara County Substance Abuse Treatment Courts between 2001 and 2011 included analysis of changes reported via the ASI. Significant positive behavioural changes were noted across all these domains for participants who remained in treatment for at least 12 months. Participants who remained in treatment were likely to reduce their drug and alcohol use and their legal

²⁴⁹ Freiberg (2005), cited in Victorian Dept of Justice Policy Framework, *ibid*, p7.

²⁵⁰ Personal communication from Peggy Hora, 22/1/12.

problems and improve their medical, family, employment and psychiatric functioning.²⁵¹

The Tasmanian Court Mandated (drug) Diversion Program

The fundamental underlying principle of the Tasmanian CMD program is to choose options which enhance the psychological and/or physical wellbeing of offenders without compromising core values of the justice system, recognising the role of the law in fostering therapeutic outcomes for offenders.²⁵² This is within the participant context of a history of significant drug use, serious offending behaviour and the alternative of severe custodial sanctions being imposed, which is relevant to the motivation of the offender to participate. Assessment procedures assist in determining to what extent prospective participants are motivated purely by the avoidance of custody or by a genuine desire to address their level of drug use.

The Tasmanian CMD program is an example of the court as case manager in Payne's typologies of specialty problem-solving courts.²⁵³ The primary function of the court is to work collaboratively with partner agencies in case management and program delivery for each offender, and the court maintains significant and ongoing contact with the offender to enhance rehabilitation.

Tasmanian CMD participant research – introduction and methodology

My research into the experience of participants in the Tasmanian drug court program does not seek to replicate the comprehensive and rigorous evaluations described in Chapters 5 and 6. Rather, it provides a snapshot of participant views about their own experience of this program at this point in time. This qualitative information provides a human face to the statistical data which is used to evaluate program success. It can serve to remind us of the ripple effect of drug abuse and crime within families and communities, and subsequently the breadth of benefits which can accrue to families and communities when drug abuse is treated and crime reduced as a result.

²⁵¹ Cosden, M, Sullivan, K, Larsen, J, Donahue, M and Thomat, A (2011), 'Evaluation of Santa Barbara County Substance Abuse Treatment Courts 2001-2011', University of California, Santa Barbara, p13.

²⁵² Fact Sheet on Sentencing Amendment Bill 2007, Parliament of Tasmania, Second Reading Speech, p1.

²⁵³ Payne (2006), cited in White, R and Perrone, S (2010), *ibid*, p377.

I also calculated the prison avoidance costs for each participant based on the Tasmanian Department of Justice's assessment of the daily cost of imprisonment (\$323).²⁵⁴ At this rate, the amount saved in prison costs for 14 of the 16 participants I interviewed totalled \$1.23 million, not including the costs for the two participants who have since been returned to prison in breach of their Drug Treatment Orders.

The 16 participants of the Court Mandated (drug) Diversion program in Hobart were interviewed between August and October 2012, after approval was granted by the Human Research Ethics Committee and the Department of Justice (Community Corrections). A table of characteristics of the participants interviewed is included at Appendix 4. I interviewed 14 male and 2 female participants, the average age of whom was 32.6 years. Participants were engaged in all stages of the program from those recently accepted on to the program (Phase 1) to those nearing graduation (Phase 3). Views were sought as to the changes in their lives which they could attribute to participating in the CMD program. Participants provided information on the understanding that the data would be de-identified and their personal details would not be published.

Interviews were conducted at the CMD office subsequent to interviewees' case management meetings with their Court Diversion Officers. Participants were provided with information about the research and signed a consent form prior to being interviewed. The interviews followed an 'appreciative inquiry'²⁵⁵ method using open-ended questions which led to a rich vein of disclosure. I asked for both positive and negative feedback about participants' experiences in the program and the impact it had had on their lives, as well as for suggestions to improve the program. Some participants made the effort to provide additional follow-up information on subsequent visits to the CMD office.

The interviews were generally very positive experiences, with most participants enthusiastic to share their views and their experiences of the program. The interviews were conducted with an awareness of Goulding's²⁵⁶ view that the

²⁵⁴ Tasmanian Department of Justice Annual Report 2010-11, accessed 29/9/12. http://www.justice.tas.gov.au/data/assets/pdf_file/0017/180710/dojar_2010-11_secure.pdf, p44.

²⁵⁵ Leibling, A and Arnold, H (2004), *Prisons and their Moral Performance: A Study of Values, Quality and Prison Life*. Oxford: Oxford University Press.

²⁵⁶ Goulding, D (2004), *Severed Connections: An Exploration of the Impact of Imprisonment on Women's Familial and Social Connectedness*. Perth: Murdoch University.

relationship between the researcher and the participant can affect the information provided during interviews. It was made clear to participants that their comments would have no impact on their current program participation.

After collating the data, a form was designed to collect information under the categories into which the participant responses fell. This form is attached as Appendix 5 and could be a useful tool for gathering such information at participant exit interviews in the future.

Experiences of participants

Feedback from all participants was overwhelmingly positive, with very few negative comments received. That said, it should be noted that these interviewees were all current program participants and I did not seek out former participants whose Drug Treatment Orders had been cancelled by the court and who been returned to prison to serve their sentence, because they had either failed the program or withdrawn their consent to continue participating in it. Some interviewees were attempting the CMD program for the second or third time. A number of interviewees had already served sanction days in prison, or did so after my interviews, and by the time my research was complete, two of the 16 participants had had their DTOs cancelled by the court and had returned to prison. The study did not seek to corroborate information provided in interviews with family, friends or professional associates of the participants, so the data is entirely self-reported and the limitations of this are accepted. It was made clear to participants that their comments would have no impact on their current program participation.

The following specific measures of success were identified by program participants and professional staff I have interviewed during the course of this research. Factors are generally listed in decreasing order of popularity: those noted by multiple interviewees are listed first, with those made by fewer or only one interviewee listed last. Direct quotes from interviewees appear in quotation marks.

Physical health

- Interest in appearance – ‘Loss of the junkie look’; ‘They just look better’; ‘People tell me how well I’m looking’.

- Weight loss or gain – ‘I’ve put on nearly 30kg’. ‘I put on 35kg in 3 months’. ‘I put on 17kg over 12 months and 10kg in the last 5 months’. ‘I’ve put on 10kg’.
- Exercise – eg joining a gym, playing sport, training, working out. ‘I’m trying to get fit and healthier’.
- Improved sleeping habits.
- Engagement with medical services.
- Accessed treatment for Hep C.
- Accessed dental services – ‘I got new teeth’.

‘I got sick of being sick all the time’.

‘I eat properly now’.

‘I’m not strung out all the time’.

Mental health / insight / attitude

- Increased confidence and self-esteem. ‘I feel proud of myself’.
- Improvement in attitude - ‘My attitude has changed – I’m not a cocky-arsed c*nt any more’.
- Insight – ‘I can see that other people have problems too now’, and ‘I’ve learnt a lot from the program. I’m more honest with myself instead of being in denial’. ‘I’m not a paranoid head case any more’. ‘I’m listening more instead of thinking I know everything’. ‘I feel bad about what I’ve done’. ‘I can see where I’m going and where I was’.
- Improved thinking skills and coping techniques. ‘I assess things differently now and I resolve the issue instead of getting angry, walking out and destroying property’. ‘I now know I have a choice about using or not’. ‘I learnt strategies to deal with stress, which was why I used’.
- Learning about undiagnosed mental illness and achieving mental stability. ‘I’m getting better and I can actually sit still and have a conversation’.
- Insight into the effects of substances on mental state. ‘I was paranoid because I’d been on drugs for so long’.
- Accessing mental health services, eg weekly counselling - ‘I’m going for a mental health assessment next week’.
- Maturity and motivation – ‘I’m able to reach out and ask for help’.

‘I’m happier in myself’.

‘I’ve settled right down and I have a new way of looking at life’.

‘I’m trying to organise my life and pull my head in’.

Relationships

- Repairing relationships and rebuilding trust with partners and parents. ‘I don’t want my family to go through that lifestyle every day’. ‘I’m getting

along better with my girlfriend because I'm not scamming and drugged off my head, and she's not worried about me all the time'. 'There's no conflict now because I'm not lying about situations so there are no trust issues'.

- Reconnecting with children, achieving access or custody - 'Gives my teenage daughter more confidence in me'. 'I'm heaps better at relating to my kids coz I'm willing to do stuff with them instead of being down all the time'. 'I want to give my kids an upbringing without drugs, alcohol and violence'. 'I'm doing a parenting program'. 'The CMD worker helped me contact Welfare to work towards custody of my son'. 'I get to see my family more and play with my son more – I take him to parks and to daycare. I never used to do that coz I was always out chasing money'. 'I've dealt with a lot of counsellors, psychiatrists and therapists for myself and my son'.
- Improved relationships with police.
- Respect for people.
- Taking responsibility for new pets.

'I've been drug free from day one in my three year old's life'.

'The program saved my butt so I could get out (of prison) with my son'.

'I play football with my 12 year old'.

'I'm no longer with my partner who is still using'.

'My Mum hadn't slept properly for five years and now she sleeps every night'.

Education

- Enrolling in formal education, eg a vocational Work Skills course or a Polytechnic computer course. 'I've done lots of courses and got my white ticket for building sites and fork lift and traffic management tickets'.

Employment

- Employment – 'Casual paving led to roofing work and that led to more and more work'. 'I've set up a legal business now'. 'I'm trying to start my own business making furniture'.
- Accessing schemes such as the New Enterprise Initiative Scheme to support new business opportunities.

'I want employment and I never wanted to work before'.

Finances

- Paying rent arrears.
- Paying court fines, or entering into a payment plan.

- Addressing other debts. 'I pay my bills and debts and I have money for nice things'. 'I have less money because I'm paying my rent and power and groceries but I don't waste it on stuff I don't need'.
- More money for purposes other than drugs - 'My financial situation is bouncing back because I'm not buying drugs'. 'I got a super payout and before the program it would have been straight up my arm but I'm looking into buying a property – I've never owned property before'.

Social engagement

- Developing a pro-social peer network - 'I now have nothing to do with drug dealers'. 'I hang out with normal people', 'My whole circle is different in every single way' and 'I have different friends now, including some Christians'!
- Learning strategies to change social networks – 'I changed my phone numbers to avoid drug users – if you sleep with dogs, you catch fleas'.
- Accessing other social services (eg Centrelink, medical, mental health and advocacy services).
- Involvement in community activities. 'A really good hobby you're passionate about helps'.
- Participation in voluntary work.

'I'm spending time fishing and bike riding instead of smoking dope'.

'I've realised that what's normal is to stay home and watch TV and walk the dog and pay the rent'.

'I had to cut off my three best mates and my brother now that I have nothing to do with other users'.

Accommodation

- Stable housing. 'This is the first house I've ever had'. 'I'm looking into buying my first house'.
- Practical assistance finding housing.

Drug use

- Not actively using drugs, or reducing the amount and the frequency of use. 'I used to use 20 times a day'. 'I was using upwards of \$500 a day. Now I have positive strategies instead of using.'
- No longer dealing drugs.
- Not manufacturing drugs. 'I'm not making speed and ice any more'.
- Undertaking ongoing treatment.
- Reduction in dose / stabilisation of substitute drugs (eg methadone, suboxone, buprenorphine).
- Increased self-awareness and insight into drug use.

'I knew the program would give me the structure I needed to give up the drugs'.

'I can talk about where I've been – before I could never talk about drugs without needing them'.

'This is the longest I've been clean for over 10 years'.

'I used one weekend but the program helped me not to go into a downhill spiral. I was disappointed in myself for using and I was honest about it'.

'I've gone from using everything to just using cannabis'.

Offending / Legal

- Reduction in arrests, court appearances, negative interactions with police - 'Not stealing . . . before I couldn't walk past something without taking it'. 'I haven't done any crime since I've been on the program'. 'Thieving is something I was so used to doing before'. 'I'm not looking for trouble any more – I've realised it's not worth it'.
- Reduced prison time and reduced expectation of going to prison – 'I'd be in prison without the program'.
- No longer dealing drugs.
- Compliance and engagement with court orders (including drug court, probation, Family Court, restraint orders, bail conditions). 'The court order gives weight to my attempts to stay away from other users'.
- Accountability to the program through urinalysis.
- Improved relationships with police - 'I don't hate police and judges now'.
- Ability to acquire a drivers licence.

The CMD Program

'Good support from my case manager – someone to talk to about my problems instead of using'.

'People that actually listen to me and understand what I'm going through and try and help me'.

'My case manager is a (expletive deleted) legend'.

'The Changing Abusive Behaviours program was excellent. I learnt skills to tackle issues instead of arguing, being violent or mentally abusive and using drugs'.

'If I didn't have the program I would have given up and kept using and dealing'.

'The individual counsellor is fantastic'.

'Getting Smart (addictive behaviours program) put the pieces of the puzzle together for me'.

'When you go to court the judge treats you completely different . . . they talk to you and let you know you're doing a good job . . . it's a good feeling . . . I look forward to going to court.' 'I treat the judge with respect and he treats me with respect'.

'(The Magistrate) is engrossed in the program and wants you to succeed and come out better. He saw me in the street and would come up and ask how I'm going. Court is easier and more laid back'.

'The prosecutor apologised for not wanting me on the program and let me know I'm doing good'.

'There are no negatives about the program but it's full on – it would be easier to do the time'.

'If you really want to quit drugs, this is the right program for you'.

Other – comprehensive change

'Life itself changes'.

'Nearly everything has changed around'.

'A whole new life'.

'It's changed my whole life around'.

'I've never looked back since starting CMD'.

'I felt that I was treated like a human'.

'I feel normality now'.

'My whole world is different . . . I have responsibilities now'.

'I don't have to wake up and figure out who I'm going to rob, and I'm not sick and crook and hanging out'.

Discussion and research conclusions

These indications of global functioning of drug court participants paint a valuable picture of qualitative progress made during the course of drug court orders. This data set can be usefully employed in conjunction with quantitative data including recidivism figures, drug use analysis and calculations of costs saved and avoided in order to provide a comprehensive case in favour of adequately funding drug courts as intelligent use of public money.

Ongoing collection of information before and after program participation is an important mechanism to validate the effectiveness and credibility of drug court programs. Such data collection is potentially consistent with the application of the Good Lives Model to offending behaviour if it is sought from an objective, rather than a deficit, perspective. The Tasmanian CMD program now employs the LS/CMI in order to capture some of this data in a systematic manner at the beginning and end of each Drug Treatment Order. Comparisons between these data sets for individuals could give an indication of some of the change that has occurred during the course of the order, particularly with respect to risk reduction. Such an analysis

is outside the scope of the current study, but would be an interesting direction for further research which could contribute to practice development as well as informing policy making and funding allocation.

Feedback from participants in this study covered a range of areas which correspond to a large degree to the categories of information collected by the LS/CMI and ASI tools, suggesting that these tools are reasonably useful in collecting such information. However, categories such as physical and mental health, finances and accommodation are not measured by the General Risk/Need Factors in the LS/CMI. Social engagement, accommodation and finances are categories which are not measured by the ASI. As with all forms of evaluation, the data which is collected is determined by the questions asked. Actuarial risk assessment tools serve a particular purpose but are not intended to elicit descriptions of positive progress, and are therefore perhaps not the most appropriate mechanism to obtain this information from program participants. If it is considered worthwhile to collect this information at all, different means will have to be used to do so more effectively. It may be more appropriate to employ a tool which also captures success in positive terms.

A simple matrix of categories could be completed by case managers at the exit interview for program participants. This could involve asking participants what changes they have made in their lives as a result of participation in the drug court program under each of the headings listed previously. Although such qualitative data is more difficult to capture consistently, to compare and collate and to store, it would enhance the quantitative data already collected and would enrich the quality of information about success which can be attributed to the program. It would be possible to assess the participant responses, for example on a scale out of 10, and then convert that score to a percentage change in each category. A sample data collection tool for this purpose has been designed as part of this study, and is included as Appendix 5. Guidelines to 'moderate' scoring the significance of the changes recorded would need to be developed in order to ensure consistency across the CMD program.

Recommendations from participants

During the course of interviews, local program participants made a number of practical suggestions they felt would enhance the quality of the program offered in Tasmania. These are listed below.

- Make the Holyoake 'Gottawanna' program a part of CMD.
- Increase the flexibility of the program to suit individual needs, particularly with respect to health issues.
- The assessment has to identify the right people for the program.
- Family violence offenders should not automatically be excluded from the program.
- The Changing Abusive Behaviours program should be mandatory for family violence offenders.
- A similar program is needed for drink drivers.
- Expedite access to the Pain Management Unit at the Royal Hobart Hospital for program participants.
- Notify participants of their current sanction tally so they know if they can expect to be going to prison when they attend court.
- Assist participants with transport expenses to attend appointments.
- There should be more interaction with participants' partners and families. This comment was echoed by the partner of a participant who wished to contribute to the research. In her view, more resources should be devoted to follow up work with families and to helping children stay in touch with parents who are program participants. She felt that partners of program participants had no say in the program. However, she accepted that the program was worthwhile and that 'it is hard getting resources for a broader approach'.



*Dutch treatment facility for homeless alcohol addicts, Amersfoort,
The Netherlands. (April 2012)*



A former client of the service. (April 2012)

Chapter 9 - Promising Practices and Recommendations

For the Tasmanian drug treatment court

I conclude with consideration of a number of ‘promising practices’ from different jurisdictions, a series of ‘observations that work’ and suggestions that I believe could be instigated by Tasmania’s drug court program.

Promising practices identified in a study of Californian Drug Courts include the following:

- Those drug courts where more agency staff attended drug court meetings and court sessions tended to have more positive outcomes;
- Sites with either a single provider or with multiple referring options but a single overseeing provider had the most positive outcomes;
- Judges on voluntary assignment to drug court, with either no fixed term or a term of at least two years, help produce the most beneficial outcomes;
- The sites that require participants to be ‘clean’ for at least six months before graduation had lower costs and higher net benefits’; and
- Drug testing frequency greater than three times per week did not appear to have added benefit; however lower frequencies were associated with less positive benefits.²⁵⁷

The 2007 Multnomah ‘Mature Drug Court’ analysis found that drug court judges who worked longer with the drug court had improved participant outcomes.²⁵⁸

Findings of a study into 20 Oregon Drug Courts included the following:²⁵⁹

- Drug courts that included law enforcement on the drug court team had 33% less recidivism;
- Programs that had at least six team members attend staffing had less than half the recidivism;

²⁵⁷ BJA Clearinghouse (2011), Part Three, *ibid*, p17.

²⁵⁸ *Op cit*, p21.

²⁵⁹ *Op cit*, p46.

- Drug courts that used a standardised assessment to determine eligibility for the program had 40% lower recidivism;
- Programs where treatment providers performed home visits had graduation rates 15% higher. Those that had the coordinator perform home visits had almost half the recidivism and 33% higher cost savings;
- Drug courts that require participants to pay program fees to graduate had 40% lower recidivism;
- Drug courts that trained staff on strength-based philosophy had 25% lower recidivism and double the taxpayer savings.

These findings were echoed in evaluation of the California Drug Courts, which also identified the following practices which were related to positive outcomes:

- Court sessions start at one every two to three weeks;
- Treatment starts at two to three times per week;
- Drug tests start at three times per week.²⁶⁰

Observations that work, and recommendations

Clearly the most important recommendation of this research is that rigorous evaluative measures be applied to the Tasmanian CMD program in order for the success of the program to be demonstrated to government. This is necessary to secure ongoing funding for the existing program and to address the current unmet need for an expansion of the service. As Chief Magistrate Michael Hill highlights, 'the restrictions on the number of participants are simply unacceptable from an access to justice perspective or from basic fairness'.²⁶¹

I was interested during my visits to overseas drug treatment courts to observe factors that worked well and which I believe could usefully be adapted and transposed to the Tasmanian context. Although the cultural context in which drug courts operate is a significant factor, and there are a number of practical challenges which have to be considered in this jurisdiction (such as the 'part time' nature of the drug court jurisdiction for multiple magistrates in Tasmania and the difficulties inherent in inserting a therapeutic process into an adversarial system) I witnessed a

²⁶⁰ *Op cit*, p13.

²⁶¹ Hill, *ibid*, p72.

number of examples of practices which could be successfully adapted and applied within this jurisdiction. With due deference to Michael Kirby's 'bowerbird of ideas' approach,²⁶² I make the following suggestions for consideration by the Tasmanian program.

Courtroom ideas

- ❖ Consider implementing pre-court conferences, or 'staffing' meetings, in all drug courts before each court session, in addition to the weekly meeting of the drug court team. These meetings are closed to the public and need not be held in the courtroom. This is the forum for the development of a therapeutic, non-adversarial culture and a team approach to problem-solving.
- ❖ Consider expanding the role of dedicated staff to create a team within each drug court – Magistrate, Prosecutor, Legal Aid Lawyer and Court Diversion Officer.
- ❖ Designated CMD courtrooms could enhance the development of a more therapeutic culture.
- ❖ Fragmentation of the therapeutic culture is reduced by avoiding the practices of listing drug court cases within 'mainstream' lists and combining drug court lists with other court lists (eg civil matters, child protection matters etc). This may be able to be addressed by listing only drug court matters at a particular sitting time. This is the practice employed by Tasmania's Chief Magistrate, who has implemented a special 11.30am sitting exclusively for drug court matters in addition to his regular 2.15pm drug court session, (also exclusively for drug court matters) on his CMD (drug court) sitting days.
- ❖ Listing positive cases first if other participants are present in court has benefits for clients who are doing well and for clients who are not doing as well. It can also be beneficial for participants' family members present in court and for members of the drug court team. Tasmania's Deputy Chief Magistrate has noted his view that justice is best served by keeping those who are performing the best waiting at court for the least amount of time.

²⁶² Brown, AJ (2011), *Michael Kirby: Paradoxes & Principles*. Sydney: The Federation Press, p120.

- ❖ Consider imposing alternative sentences for breaches, including a 1000 word essay explaining a relapse, or an autobiography, or a session/s in the jury box to observe and critique drug court proceedings.
- ❖ Other means to reward positive responses include using the participant's first name and the use of applause and hand-shaking at graduation between phases and from the program. One of Tasmania's magistrates bakes a cake on the occasion of graduations from her CMD list!

Program ideas

- ❖ Take 'before' and 'after' photos of program participants.
- ❖ Provide participants with appointment diaries and bus passes to facilitate attendance at programs and appointments. One of Tasmania's magistrates regularly asks participants to keep a diary for both appointments and reflections on their progress, and he invites participants to share their diarised observations with him in confidence if they wish to.
- ❖ Focus on the provision of more in-house services, co-located to the greatest extent possible.
- ❖ Adopt a flexible approach to group programs if participant needs cannot be met during normal office hours. This could include conducting evening and weekend programs.
- ❖ Consider the case for dispensing with cannabis testing (as in Santiago, New York and Cardiff).
- ❖ Consider adopting the ASI or a different tool to gather positive-change data as an alternative to the LS/CMI to assess changes in functioning over time.

Strategic ideas

- ❖ Work more closely with the University of Tasmania – further education, research, evaluation, grants applications, placements for post-graduate students.
- ❖ Strive for a team of highly qualified professional staff and create a culture of continuous improvement in staff training and development.
- ❖ Further education about therapeutic jurisprudence should extend across all stakeholders and to the wider legal profession, treatment professionals and police.

- ❖ Seek multi-partisan political support for the CMD program (before an election is called).
- ❖ Consider seeking alternative sources of funding for the program – including churches, private health insurance companies and donations in kind (eg toys for participants' children).
- ❖ Address the manifest lack of residential rehabilitation beds to service Tasmania's drug court population.
- ❖ Consider the possibility of creating a distinct therapeutic division in the Magistrates' Courts, such that specialist 'alternative' or therapeutic court lists (including the mental health list, the youth court, the drug treatment court and future similar courts such as a drink-driver court and a special circumstances court) could be managed together yet separate to the mainstream court lists. Such a division could attract dedicated therapeutic court teams of magistrates, prosecutors, Legal Aid lawyers, private legal practitioners and case managers. A therapeutic division, with designated courtrooms, would enhance the development of a therapeutic culture, which is very difficult to create as a side-line within an adversarial judicial context.



French Sentence Implementation Judge Gwen at work, Professor Martine translating. (April 2012)

Conclusion

Professor Michael Perlin from the New York Law School sums up the challenges of the therapeutic jurisprudence movement as such:

EVERYTHING we do (well, almost) in the US correctional system is counterproductive, disproportionately too expensive and self-defeating. We continue to do it because politicians read voters as wanting/demanding policies that are 'tough on crime' for a variety of heuristic, false 'ordinary common sensical' reasons (many of which are profoundly racist and bigoted at their base) . . . We have to deal with the fact that those of us who 'get' this are a small minority of the voting public, and that, simply, there is no room for rational debate on the matter. Penny-wise-and-pound-foolish doesn't even begin to explain it.²⁶³

Frank Vincent fears that the Queensland approach will be replicated in other parts of the country as economic pressures and public fears increase:

Governments tend to operate by reference to what they regard as political imperatives including the electoral cycle, and seldom calculate the true economic costs much beyond the timeframe of one or two elections at most. The long term or even short term social costs are seldom included in their assessments and certainly when they perceive that resources will be presented as being diverted to criminals and the undeserving. It is an ongoing struggle to persuade them to maintain a broader understanding of what are ultimately more rational approaches than the ritual imposition of what is so often counterproductive and unreasoning incarceration.²⁶⁴

Despite political, public and economic hurdles, drug courts are thriving and expanding in many jurisdictions, both within the USA and in the Asia-Pacific region. The Chief Justice of Western Australia, Wayne Martin, recently spoke favourably about the effectiveness of drug courts, and a mental health court is about to be

²⁶³ Michael Perlin, tjsp@topica.com, 17/9/12.

²⁶⁴ Frank Vincent, tjsp@topica.com, 14/9/12.

established in Perth.²⁶⁵ There are also initiatives in New Zealand to establish a drug and alcohol court, so it is 'not all doom and gloom from south of the equator!'²⁶⁶

My own study has shown that there is much evidence for the success of drug courts globally although there remain critical issues about the comparability of data between agencies and the gaps in the nature of the data collected. This participant research reveals useful categories of data which could be collected to capture the impact of drug courts and to more broadly demonstrate the success achieved by programs such as CMD, an essential aspect of ensuring that such programs continue to be adequately funded to achieve their goals. This addresses some of the criticisms of therapeutic jurisprudence raised in the literature and goes some way to filling some of the gaps identified in the process of 'capturing success'.

Alex de Savornin Lohman, legal attorney for the Centre for Sustainable Justice in The Netherlands, describes the problem-solving court system as

'super beneficial for the quality of relationships within society. This is how the justice system should function and how judicial power should be deployed. With this kind of justice the justice system makes true the responsibilities it got from the people when it dedicated judicial power to the justice system'.²⁶⁷

A substantial body of literature as well as my own experience of 16 of these courts in action provides clear and comprehensive evidence of just how 'super beneficial' drug treatment courts can be to participants and their families and to the wider community as well as to the economies of jurisdictions which implement them. Whether considered from the economic perspective, in terms of reduced drug use and recidivism (and therefore community safety), or in terms of the global functioning and contribution to society, there is an overwhelming body of evidence that drug courts are successful. As a relatively new discipline within judicial decision-making, there remains work to be done in refining processes and procedures and in defining and measuring success in ways that can be used to demonstrate the effectiveness of these programs and therefore to secure the funding required to enhance and expand

²⁶⁵ http://www.supremecourt.wa.gov.au/files/AIJA_Oration_%20Managing_Change_in_the_Justice_System_Martin_CJ_Sept_2012.pdf, accessed 22/9/12.

²⁶⁶ Michael King, tjsp@topica.com, 16/9/12.

²⁶⁷ Communication to web forum tjsp@topica.com, 19/3/12.

them. Research encompassing a full economic analysis would be of benefit as it seems inevitable that economic assessments will be central to the future development of criminal justice policy. The continuing commitment of government to increase prison capacity without consideration of more efficient alternatives is 'increasingly untenable'.²⁶⁸ My own research both overseas and locally confirms the findings of the vast majority of the literature that this approach to judicial decision-making is effective, cost-efficient and worthy of investment in order to grow. It is hoped that governments will look to the evidence and heed the call to fund these programs into the future.

In addition to the expansion of therapeutic courts, it is an encouraging prospect that a therapeutic approach will continue to spread to mainstream court systems ('mainstreaming TJ').²⁶⁹ This will inevitably occur to some extent as judges and magistrates move between mainstream and therapeutic courts, and as this relatively new approach to jurisprudence becomes more widely known and applied. It is an exciting and innovative area in which to be involved at a time when reform is spreading rapidly within the traditionally conservative judicial context. Therapeutic jurisprudence has much to offer justice systems around the world and if its uptake in recent years can be considered a guide, its future is assured, notwithstanding the legitimate concerns expressed above. It is a conceivable and hopeful possibility that future generations of consumers of court services could experience a therapeutic approach to addressing their matters as the courtroom norm.

The Hon John R. Schwartz, Supervising Judge in the 7th Judicial District of New York, is a drug court judge with 30 years of experience behind the bench. He wrote in the Wall Street Journal in April 2012 that 'individuals who are addicted to drugs or alcohol require treatment in order to find long-term recovery, not the threat of punishment . . . if we are serious about reducing substance abuse, crime and recidivism, and saving taxpayers money, then we must accept that our criminal justice system is filled with seriously addicted people who need treatment to change their behaviour. Drug courts must be the foundation of that reform.'²⁷⁰

²⁶⁸ Fox & Albertson (2010), *ibid*, p263.

²⁶⁹ See Magistrate Pauline Spencer (2012), *ibid*.

²⁷⁰ Wall Street Journal, letters to the editor, 30/4/12.

Appendices

Appendix 1 - US National Association of Criminal Defense Lawyers ²⁷¹

SUMMARY OF RECOMMENDATIONS

DECRIMINALIZATION: THE SMART, FAIR, ECONOMICAL AND EFFECTIVE ALTERNATIVE

Address substance abuse as a public health issue — not a criminal justice issue.

Drug Courts in Action: Operation, Issues, and Problems

- ☐ ☐ Admission criteria must be revised to end skimming.
- ☐ ☐ Judges in traditional courtrooms should be encouraged to use innovative drug court techniques in their courtrooms.
- ☐ ☐ Prosecutors must relinquish their role as gatekeeper.
- ☐ ☐ Admission criteria should be objective and broad.
- ☐ ☐ Crimes of violence must not be categorically excluded.
- ☐ ☐ Drug courts must use a pre-plea, pre-adjudication model.
- ☐ ☐ In order for defense counsel to properly advise clients, adequate time must be provided to allow defendants to decide whether to enroll in drug court.
- ☐ ☐ The state must have a triable case.
- ☐ ☐ Immunity must be granted to all statements made in drug court.
- ☐ ☐ Judges must not directly or indirectly coerce defendants to secure waivers of counsel.
- ☐ ☐ Drug courts must do everything possible to ensure that every lawyer who wants to appear in drug court has the opportunity to do so.
- ☐ ☐ Sanctions must be imposed in a fair and consistent manner.
- ☐ ☐ The judge who guides treatment should not be the judge who determines termination or hears the underlying case after termination.

²⁷¹ National Association of Criminal Defense Lawyers (2009), *ibid*, pp54-5.

- Ex parte communication must never be permitted.
- Drug court assignments must go to experienced, interested judges who remain for more than a year.
- Sentences for those who attempt drug court must not exceed what would have been imposed if the standard plea was taken.
- Some amount of credit time should be applied to the sentence of anyone who spends several months complying with a drug court program and working toward completion before ultimately failing.

Role of Defense Counsel and Ethical Concerns

- Drug court “theater” must include a leading role for defense counsel.
- Ethical rules do not need to change; the drug court framework must accommodate the rules.
- The defense bar must have a significant role in the creation of any new drug courts.
- Training for defense lawyers must be readily available and broad enough to cover the key aspects of representing clients in drug court.
- The same lawyer should represent a client throughout a drug case.
- Senior and highly skilled lawyers should be assigned to drug court.
- Caseloads of lawyers representing clients in drug court must take into account the special nature and demands of drug court.
- Drug courts should consider allowing participants to attend staffings.

Concerns About Minorities, the Poor, and Immigrants

- Admission criteria must be carefully created and reviewed to ensure drug courts are open to all people regardless of race, economic status, or immigration status.
- The intensive supervision of drug court cannot create impossible obstacles for participants to succeed.
- Immigrants who successfully complete drug treatment courts must not be deported on the basis of the drug court “conviction,” no matter how defined.

Misallocation of Public Resources

- Drug courts must be used for high-risk defendants facing lengthy jail terms; less onerous and expensive alternatives to drug court must be readily available for low-risk defendants and those who commit low-level offenses.
- Fair and effective alternatives must be offered to low-level offenders.
- Sufficient resources must be available to permit drug treatment for all who qualify.
- Defendants who do not suffer from chemical dependency must be provided with alternative programs to avoid criminal prosecution.
- Sound research on important topics related to the diversion of cases, including drug courts, must be pursued.

Mental Health Courts

- Treat persons with illness; do not incarcerate them.
- Devote sufficient and appropriate resources.
- Screening should occur early, include multiple referral sources, and allow for broad access.
- Counsel and the court must ensure that participation is voluntary.
- Counsel must zealously represent each client's stated interest.



Judge Uli in Vienna. (May 2012)

Appendix 2 – Evaluation model used by NPC Research

for drug courts in the USA.

Taken from http://www.npcresearch.com/specialty_drug_courts.php, 22/9/12.

Adult Drug Court Program Logic Model

A logic model can help drug court teams clarify how, in the context of their target population and environment, resources should support program activities and intended outcomes.

NIJ has developed a logic model for adult drug court programs that court administrators and their partners who want to examine the performance of their drug courts may find useful. The logic model can help clarify the best way to use resources and what long- and short-term outcomes drug court teams should consider measuring.

The logic model has six components:

1. Inputs — financial, staff, equipment and other resources invested to support the program.
2. Activities — structured services intended to deliver what is necessary to achieve objectives.
3. Outputs — observable and measurable events resulting from program implementation.
4. Short-term outcomes — immediate changes realized especially during program participation.
5. Long-term outcomes — changes realized after program participation.
6. External factors — conditions outside the program that affect implementation and outcomes.

Performance Measures

Using a logic model, the components can be tied to program objectives, as in these performance measures:

- Increase percentage of drug court participants who reduce substance use while in the program.
- Reduce percentage of drug court participants who reoffend while in the program.
- Increase percentage of drug court participants who graduate from the program.
- Increase total number of drug court graduates.
- Reduce percent of drug court participants who reoffend within one year after program completion.

Program Evaluation

The logic model also can guide evaluations of drug court programs:

- A **process evaluation** documents a program's actual caseload, service delivery and resources in relation to its planned target population, policies and procedures over time.
- An **outcome evaluation** measures the program's influence on graduation, criminal recidivism and relapse among cohorts of participants.

- An **impact evaluation** gauges the effect of the intervention on the target population, if information is available on comparable defendants or offenders outside the program.
- **Cost-efficiency analysis** indicates what impact the program intervention has on public resource expenditures, and whether program investment yields savings over the status quo or some alternative.

INPUTS	ACTIVITIES	OUTPUTS	SHORT-TERM OUTCOMES	LONG-TERM OUTCOMES
Probation Community Public resources Courthouse Treatment Jail Grant funds Technical assistance	Risk/needs assessment Judicial interaction Alcohol and other drug monitoring (including testing) Community supervision Graduated sanctions/ incentives (including jail) Alcohol and other drug treatment services Ancillary services	Program intake screen Program admission Court appearances Treatment admission Alcohol and other drug tests Probation contacts Classes attended Services accessed Jail stays	Recidivism in- program Alcohol and other drug use in- program Supervision violation Program violation Treatment retention Skills development Service needs met Criminal thinking	Recidivism post-program Alcohol and other drug relapse post-program Program graduation/ termination Probation revocation/ successful termination Jail/prison imposed Employment/education/ housing/health

Appendix 3 - List of 27 recommendations from NPC research 'Adult Drug Court Practices Related to "Cost Savings" (Costs Avoided)' ²⁷²

Practices Related to Positive Cost Outcomes

- The drug court has a single treatment provider (that can make referrals to other treatment as needed).
- The treatment representative is expected to attend all drug court sessions.
- The prosecution is expected to attend all drug court team meetings (participant progress meetings).
- The prosecution is expected to attend all drug court sessions.
- The defense attorney is expected to attend drug court team meetings (participant progress meetings).
- The drug court allows non-drug charges.
- The drug court expects 20 days or less to pass from a participant's arrest to drug court entry.
- The drug court maintains a caseload of less than 150 clients.
- The drug court program is expected to take one year or more for participants to complete.
- Drug court has guidelines on the frequency of group treatment sessions that a participant must receive.
- Drug court has guidelines on the frequency of individual treatment sessions that a participant must receive.
- In the first phase of drug court, tests are collected at least 2 times per week.
- Drug court staff generally has drug test results within 48 hours.
- The drug court requires participants to have greater than 90 days "clean" before graduation.
- The drug court decreases the frequency of future treatment sessions as a reward.
- Only the judge can provide clients with tangible rewards.
- The judge is assigned to drug court for a term greater than 2 years (or indefinitely).

²⁷² www.npcresearch.com/Files/NIJ_Cross-site_Executive_Summary_0308.pdf

- In the first phase of drug court, participants appear before the judge in court once every 2 weeks or less.
- In the final phase of drug court, the clients appear before the judge in court at least once per month.
- The drug court maintains data critical to monitoring and evaluation in an electronic database (rather than paper files).
- The drug court collects program statistics and uses them to modify drug court operations.
- The drug court uses the results of program evaluations to modify drug court operations.
- The drug court has participated in more than one evaluation conducted by an independent evaluator.
- Team members received training in preparation for the implementation of the drug court.
- All new hires to the drug court complete a formal training or orientation.
- All members of the drug court team are provided with training.
- The drug court team includes a representative from law enforcement (not including probation).

Appendix 4 – Characteristics of CMD Participants Interviewed
(August – October 2012)

ID No / (false) name	Gender	Age	Program Phase (1-3)	Prison sentence	Prison costs avoided	Comments
1 Nigel	M	27	2	9 months	\$87,210	
2 Brian	M	40	2	5 months	\$48,450	
3 Barry	M	45	1	6 months	n/a	CMD order was cancelled shortly after his interview
4 Hugh	M	24	1	8 months	\$77,520	
5 Mark	M	41	2	12 months	\$116,280	
6 Paul	M	41	1	10 months	\$96,900	
7 Drew	M	30	3	4 months	\$38,760	
8 Tom	M	24	1	6 months	\$58,140	
9 Simon	M	33	1	16 months	\$155,040	
10 Jerry	M	29	1	5 months	\$48,450	
11 Tina	F	28	2	6 months	\$58,140	
12 Jim	M	41	1	20 months	\$193,800	
13 Mick	M	24	1	6 months	\$58,140	CMD order cancelled and returned to prison
14 Tony	M	35	3	7 months	\$67,830	
15 Lisa	F	35	1	7 weeks	\$15,827	Consent withdrawn but no further prison time
16 Alex	M	26	1	18 months	\$174,420	Total savings = \$1,236,767.

Total prison costs saved by 14 of the above participants to date:

- @ \$323²⁷³ per day, using an average month of 30 days
- over a total of 138 months and 7 weeks

= \$1.23 million.



*Sixth Municipal District Circuit Court Building,
Cook County, Chicago. (March 2012)*

²⁷³ Prison cost per day assessed by the Tasmanian Department of Justice 2010-11 Annual Report, *ibid*, p44, accessed 29/9/12.

Appendix 5 – Sample Exit Interview Feedback form

(Sample results compiled from participant interviews)

What are the main changes have you made in your life in each of the following areas as a result of participating in the CMD (drug court) program?

Category (list achievements and/or comments)	Corroborated? (Y/N)	CDO to score significance of change out of 10 (1=min, 10=max) (see guidelines)	% change in category over duration of Drug Court Order	Pro social (positive) (+) or pro criminal (negative) (-) change?
Physical health <ul style="list-style-type: none"> • Gained 20kg • Joined a footy team • Hep C treatment • Dental care 	Y Y Y Y	5 4 3 3	50% 40% 30% 30%	+ + + +
Mental health / insight / attitude <ul style="list-style-type: none"> • Increase in confidence, pride in self • Victim empathy • Developed coping strategies 	Y N Y	5 3 5	50% 30% 50%	+ + +
Relationships <ul style="list-style-type: none"> • Fixed things with my partner • Regained custody of my children 	Y Y	7 8	70% 80%	+ +

Education <ul style="list-style-type: none"> • Did a WorkSkills course 	Y	3	30%	+
Employment <ul style="list-style-type: none"> • Have some casual work • I lost my job because of all my CMD appointments 	Y	5	50%	+
	Y	5	50%	-
Finances <ul style="list-style-type: none"> • Fines payment plan • Paid rent arrears • No more drug debts 	Y	4	40%	+
	Y	3	30%	+
	N	6	60%	+
Social engagement <ul style="list-style-type: none"> • Spend time fishing with mates who don't use • I had to break away from the other users at the ADS 	Y	7	70%	+
	N	6	60%	+
Accommodation <ul style="list-style-type: none"> • I have a lease and I'm paying the rent on time • Lived at the same address for six months 	Y	7	70%	+
	Y	5	50%	+

Offending / legal <ul style="list-style-type: none">• 'I'll never go to prison again'• Obtained driver's licence for the first time• No charges for over a year• No longer 'hassled' by police• Not dealing drugs• 'I would only use dope now'	N	8	80%	+
	Y	6	60%	+
	Y	7	70%	+
	N	4	40%	+
	N	7.5	75%	+
	N	6	60%	+
Drug use <ul style="list-style-type: none">• Not using any illegal drugs• Reduced, stable dose of suboxone• This is the longest I've ever been clean• I had one lapse but got things back under control	Y	8	80%	+
	Y	6	60%	+
	N	9	90%	+
	Y	7	70%	+
Other <ul style="list-style-type: none">• I finished the CAB program• I feel like a normal person now	Y	5	50%	+
	Y	8	80%	+

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